WISCONSIN JURY INSTRUCTIONS

CRIMINAL

VOL. II

WISCONSIN
CRIMINAL
JURY INSTRUCTIONS
COMMITTEE

UNIVERSITY OF WISCONSIN
LAW SCHOOL

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WISCONSIN JURY INSTRUCTIONS

CRIMINAL

VOLUME II

Wisconsin Criminal Jury Instructions Committee

University of Wisconsin Law School

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1000 INTRODUCTORY COMMENT: WISCONSIN'S NEW HOMICIDE LAW

[WITHDRAWN]

COMMENT

Wis JI-Criminal 1000, Introductory Comment: Wisconsin's New Homicide Law, was originally published in 1989. Its withdrawal was approved by the Committee in August 2005.

This Introductory Comment was published to identify and explain the substantial changes made to the Wisconsin law of homicide by 1987 Wisconsin Act 399. It outlined those changes and included as appendices copies of the new statutes and a copy of the original bill that included Judicial Council Notes explaining the changes.

Because the "new" homicide law has been in effect for over 15 years, the Committee concluded that the Introductory Comment was no longer needed. Further, with one exception, the information it contained is available from other sources. The Judicial Council Notes to the original bill [1987 Senate Bill 191] are provided as annotations in the Wisconsin Statutes, following each statute affected by the homicide revision. A comprehensive outline and discussion of the changes can be found in "The Importance of Clarity in the Law of Homicide: The Wisconsin Revision," by Walter Dickey, David Schultz, and James L. Fullin, Jr., 1989 Wisconsin Law Review1325. The single item not generally accessible is the Prefatory Note to 1987 Senate Bill 191 and it is preserved below.

All case law interpreting the homicide statutes is included in the Comment to the relevant instructions.

In 1982, the Wisconsin Judicial Council created a committee to analyze Wisconsin's law of homicide and to draft a bill that would make the necessary clarifications. A bill introduced as 1985 Senate Bill 279 failed to pass and was reintroduced as 1987 Senate Bill 191. The provisions of that bill were incorporated into the budget bill and were passed as part of 1987 Wisconsin Act 399. A delayed effective date was adopted: the homicide changes would apply to offenses committed on or after January 1, 1989. The following is the "Prefatory Note" to 1987 Senate Bill 191; it provides information regarding the background of the homicide revision and summarizes the major provisions.

1987 SENATE BILL 191

PREFATORY NOTE: This bill contains the recommendations of the judicial council committee on homicide and lesser included offenses, the members of which are listed in the last paragraph of this NOTE. That committee held 11 meetings between September 1982 and May 1983, minutes of which are available from the judicial council. The committee concluded that:

(1) Wisconsin's homicide statutes contain antiquated legalistic terminology which obscures the actual elements of these offenses.

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(2) The differences between various homicide offenses are statutorily expressed in misleading terms, which results in inappropriate charging.

(3) The relevancy of intoxication to crimes based on criminal recklessness is not statutorily defined, which has produced conflicting judicial interpretations of the recklessness offenses.

(4) The statutory mental elements of the homicide offenses are also used in crimes of injury and endangering safety, where they cause many of the same problems as in the homicide area.

(5) The felony murder statute is of minimal usefulness because it does not permit enhanced punishment for causing death in the commission of a Class B felony.

(6) The penalties for certain crimes resulting in death, injury or endangering safety do not reflect differences in the culpable mental elements or the seriousness of the results or both.

The committee therefore recommended, and this bill provides, that the most serious homicide offenses be divided into intentional and reckless categories, with 2 degrees of each, corresponding to present first-degree murder, manslaughter, 2nd-degree murder and homicide by reckless conduct. The revised codification preserves the traditional elements of each offense but modernizes terminology.

The bill conforms the definition of "intent to kill" to the uniform definition of criminal intent. It also creates a uniform definition of "criminal recklessness", requiring both the creation of an objectively substantial and unreasonable risk of death or serious injury, and the actor's subjective awareness of that risk. However, voluntary intoxication is not a defense if the actor, had he or she been sober, would have had such an awareness. The bill creates a uniform definition of criminal negligence, requiring the creation of a substantial and unreasonable risk of death or serious injury, of which the actor should be aware.

The bill increases the penalty for the offense now known as manslaughter from a Class C to a Class B felony and abolishes the legal fiction, that it is not an intentional homicide. Thus, persons convicted of this offense would be barred from benefitting from the victim's estate under chapter 228, laws of 1981. The revision clarifies the state's burden, of proof, both when this offense is charged and when it is submitted as a lesser included offense in prosecutions for first-degree intentional homicide. The bill defines "adequate provocation" to require both subjective loss of control and an objectively sufficient cause for that condition.

The bill limits felony murder to homicide caused in the commission or attempt to commit armed burglary, armed robbery, arson, first degree sexual assault or 2nd degree sexual assault by use or threat of force or violence. The bill allows punishment for the homicide and the underlying felony to be cumulative.

The bill eliminates the obsolete term, "depraved mind", clarifying that the offense now known as 2nd-degree murder requires not a mental disorder, but criminal recklessness aggravated by circumstances which show utter disregard for human life.

The same mental element is prescribed for first-degree reckless injury and first-degree recklessly endangering safety. The bill creates the crimes of 2nd-

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degree reckless injury and 2nd-degree recklessly endangering safety. Creation of the latter statute eliminates the need for the separate offenses of highway obstruction (s. 941.03, stats.) and mooring watercraft to railroad tracks or fixtures (s. 941.04, stats.). The bill, therefore, eliminates both offenses.

The bill also reduces the .mental element of the offense now known as reckless use of weapons from reckless conduct to criminal negligence, to distinguish this Class A misdemeanor from the Class E felony of recklessly endangering safety, 2nd degree.

The bill retains the Class D felony of homicide by negligent use of weapon but reduces homicide by negligent use of vehicle to a Class E felony, as it was before May 1, 1986. The bill reduces the maximum imprisonment for causing great bodily harm by negligent use of vehicle from 2 years to 18 months.

Finally, the bill eliminates the phrase "high probability" from numerous provisions of the criminal code to avoid any inference that a statistical likelihood greater than 50% was ever intended. The bill substitutes the concept of "substantial risk".

The judicial council's homicide and lesser included offenses committee consisted of: Prof. Walter J. Dickey, (chair); Justice Shirley S. Abrahamson; Judge Michael J. Barron; Asst. Atty. Gen. David J. Becker; William U. Burke; William M. Coffey; Francis R. Croak; Jerome L. Fox; Sen. Donald .Hanaway; Asst. Dist. Atty. Michael Malmstadt; Judge Gordon Myse; Revisor of Statutes Orlan L. Prestegard; Prof. Frank J. Remington; Asst. Public Defender Michael J. Rosborough; Rep. James A. Rutkowski; Janet Schipper; and Prof. David E. Schultz. The reporter was James L. Fullin, Jr.

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1010 FIRST DEGREE INTENTIONAL HOMICIDE – § 940.01(1)(a)[1]

Statutory Definition of the Crime

First degree intentional homicide, as defined in § 940.01 of the Criminal Code of Wisconsin, is committed by one who causes the death of another human being with the intent to kill that person or another.

State's Burden of Proof

Before you may find the defendant guilty of first degree intentional homicide, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following two elements were present.

Elements of the Crime That the State Must Prove

1. The defendant caused the death of (name of victim).

   "Cause" means that the defendant's act was a substantial factor in producing the death.[2]

2. The defendant acted with the intent to kill ((name of victim)) (another human being).[3]

   "Intent to kill" means that the defendant had the mental purpose to take the life of another human being or was aware that (his) (her) conduct was practically certain to cause the death of another human being.[4]

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When May Intent Exist?

While the law requires that the defendant acted with intent to kill, it does not require that the intent exist for any particular length of time before the act is committed. The act need not be brooded over, considered, or reflected upon for a week, a day, an hour, or even for a minute. There need not be any appreciable time between the formation of the intent and the act. The intent to kill may be formed at any time before the act, including the instant before the act, and must continue to exist at the time of the act.

Deciding About Intent

You cannot look into a person's mind to find intent. Intent to kill must be found, if found at all, from the defendant's acts, words, and statements, if any, and from all the facts and circumstances in this case bearing upon intent.[5]

Intent and Motive

Intent should not be confused with motive. While proof of intent is necessary to a conviction, proof of motive is not. "Motive" refers to a person's reason for doing something. While motive may be shown as a circumstance to aid in establishing the guilt of a defendant, the State is not required to prove motive on the part of a defendant in order to convict. Evidence of motive does not by itself establish guilt. You should give it the weight you believe it deserves under all of the circumstances.

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Jury's Decision

If you are satisfied beyond a reasonable doubt that the defendant caused the death of (name of victim) with the intent to kill, you should find the defendant guilty of first degree intentional homicide.

If you are not so satisfied, you must find the defendant not guilty.

COMMENT

Wis JI-Criminal 1010 was originally published in 1989. This revision was approved by the Committee in November 1999 and involved adoption of a new format and nonsubstantive changes to the text.

This instruction is for a violation of § 940.01, created by 1987 Wisconsin Act 399 as part of the revision of the homicide statutes. The statute applies to offenses committed on or after January 1, 1989. For a discussion of the homicide revision generally and of the offense covered by this instruction, see the Introductory Comment at Wis JI-Criminal 1000.

This offense, first degree intentional homicide, is essentially the same as first degree murder under prior law. The penalty is that of a Class A felony: life imprisonment.

1. This instruction is for a case where there is no evidence of any privilege or mitigating circumstance. Separate instructions are drafted for cases where, for example, evidence of adequate provocation or self-defense is in the case. See Wis JI-Criminal 1012, 1014.

2. The Committee has concluded that the simple "substantial factor" definition of cause should be sufficient for most cases. Where there is evidence of more than one possible cause, something like the following might be added immediately preceding the sentence in the instruction beginning with "before":

> There may be more than one cause of death. The act of one person alone might produce it, or the acts of two or more persons might jointly produce it.

Also see Wis JI-Criminal 901, **CAUSE**.

3. The parenthetical reference to "another human being" is to be used in a case involving the common law doctrine of "transferred intent," which has been described as follows:

> It is immaterial that the human being killed is not the one the actor intended to kill. If X shoots at and kills a person who he thinks is Y but who is actually Z, X is as guilty as if he had not been mistaken about the identity of the person killed. The same is true where X shoots at Y intending

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to kill him, but he misses Y and kills Z. In both of these cases, X has caused "the death of another human being by an act done with intent to kill that person or another." In other words, the section incorporates the common law doctrine of "transferred intent." 1953 Judiciary Committee Report on the Criminal Code, Wisconsin Legislative Council, page 58.

4. The phrase "or aware that his conduct is practically certain to cause that result" was added to the definition of "with intent to" found in § 939.23 by the 1988 revision of the homicide statutes. Further, the revision applied the § 939.23 definition to homicide offenses. Under prior law, "with intent to kill" was defined solely in terms of mental purpose for offenses in Chapter 940. See the discussion in Wis JI-Criminal 1000 and 923.2.

5. This is the shorter version used to describe the process of finding intent. The Committee has concluded that it is suitable for use in most cases. For the longer description of the intent-finding process, see Wis JI-Criminal 923A [formerly Wis JI-Criminal 923.1].

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1011 FIRST DEGREE INTENTIONAL HOMICIDE OF AN UNBORN CHILD — § 940.01(1)(b)

Statutory Definition of the Crime

First degree intentional homicide, as defined in § 940.01(1)(b) of the Criminal Code of Wisconsin, is committed by one who causes the death of an unborn child with the intent to kill [that unborn child] [(or) the woman who is pregnant with that unborn child] [(or) another].

State's Burden of Proof

Before you may find the defendant guilty of first degree intentional homicide, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following two elements were present.

Elements of the Crime That the State Must Prove

1. The defendant caused the death of an unborn child.

   "Cause" means that the defendant's act was a substantial factor in producing the death of the unborn child.[1]

   "Unborn child" means any individual of the human species from fertilization until birth that is gestating inside a woman.[2]

2. The defendant acted with the intent to kill [the unborn child] [(or) the woman who was pregnant with the unborn child] [(or) another human being].

   "Intent to kill" means that the defendant had the mental purpose to take the life of [an unborn child] [(or) the woman who was pregnant with the unborn child] [(or)

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another human being] or was aware that his or her conduct was practically certain to cause the death of [an unborn child] [(or) the woman who was pregnant with the unborn child] [or another human being].

When May Intent Exist?

While the law requires that the defendant acted with intent to kill, it does not require that the intent exist for any particular length of time before the act is committed. The act need not be brooded over, considered, or reflected upon for a week, a day, an hour, or even for a minute. There need not be any appreciable time between the formation of the intent and the act. The intent to kill may be formed at any time before the act, including the instant before the act, and must continue to exist at the time of the act.

Deciding About Intent

You cannot look into a person's mind to find intent. Intent to kill must be found, if found at all, from the defendant's acts, words, and statements, if any, and from all the facts and circumstances in this case bearing upon intent.[3]

Intent and Motive

Intent should not be confused with motive. While proof of intent is necessary to a conviction, proof of motive is not. "Motive" refers to a person's reason for doing something. While motive may be shown as a circumstance to aid in establishing the guilt of a defendant, the State is not required to prove motive on the part of a defendant in order to convict.

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Evidence of motive does not by itself establish guilt. You should give it the weight you believe it deserves under all of the circumstances.

Jury's Decision

If you are satisfied beyond a reasonable doubt that the defendant caused the death of an unborn child with the intent to kill [that unborn child] [(or) the woman who is pregnant with that unborn child] [(or) another], you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.

COMMENT

Wis JI-Criminal 1011 was originally published in 1999. This revision adapted the instruction to a new format and was approved by the Committee in April 2005.

This instruction is drafted for the offense defined in § 940.01(1)(b), which was created by 1997 Wisconsin Act 295 [effective date: July 1, 1998]. The act revised all the general homicide statutes to apply to causing the death of an unborn child; several nonhomicide statutes were similarly revised.

Section 939.75, also created by Act 295, defines "unborn child" and sets forth several exceptions to the applicability of the revised statutes. Subsection (2)(b) recognizes the following exceptions:

- induced abortions [subd. 1.]
- acts committed in accordance with usual and customary standards of medical practice during diagnostic testing or therapeutic treatment by a licensed physician [sub. 2.]
- an act by a health care provider that is in accordance with a pregnant woman's power of attorney for health care, etc. [subd. 2h.]
- an act by a woman who is pregnant with an unborn child [subd. 3.]
- the lawful prescription, dispensation or administration, and the use by a woman of, any medicine, drug or device that is used as a method of birth control or is intended to prevent pregnancy. [subd. 4]

Subsection (3) provides that if any of these exceptions are "placed in issue by the trial evidence, the state must prove beyond a reasonable doubt that the facts constituting the exception do not exist. . . ." Thus, these exceptions are to be handled in the same manner as, for example, the mitigating circumstance of adequate provocation under the general homicide law: once supported by some evidence, the absence of the exception becomes a fact the state must prove. The Committee decided not to draft instructions for the absence of these

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exceptions because it appeared to the Committee that their applicability would most likely be determined before charges were filed or at least before trial.

1. If a more extensive definition of "cause" is necessary, see Wis JI-Criminal 901.

2. This is the definition provided in § 939.75(1).

3. This instruction on finding intent is a shorter version of a longer statement commonly used in the standard instructions. The Committee concluded that this shorter version is appropriate for most cases. The complete, traditional statement is found at Wis JI-Criminal 923A.

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1012 FIRST DEGREE INTENTIONAL HOMICIDE; ADEQUATE PROVOCATION; SECOND DEGREE INTENTIONAL HOMICIDE — § 940.01(2)(a); § 940.05

Crimes To Consider

The defendant in this case is charged with first degree intentional homicide, and you must first consider whether the defendant is guilty of that offense. If you are not satisfied that the defendant is guilty of first degree intentional homicide, you must consider whether or not the defendant is guilty of second degree intentional homicide, which is a less serious degree of criminal homicide.

Intentional Homicide

The crimes referred to as first and second degree intentional homicide are different degrees of homicide. Homicide is the taking of the life of another human being. The degree of homicide defined by the law depends on the facts and circumstances of each particular case.

While the law separates intentional homicides into two degrees, there are certain elements which are common to each crime. Both first and second degree intentional homicide require that the defendant caused the death of the victim with the intent to kill. First degree intentional homicide requires the State to prove the additional fact that the defendant did not act under the influence of adequate provocation. It is for you to decide of what degree of homicide the defendant is guilty, if guilty at all, according to the instructions which define the two degrees of intentional homicide.

Statutory Definition of First Degree Intentional Homicide

First degree intentional homicide, as defined in § 940.01 of the Criminal Code of Wisconsin, is committed by one who causes the death of another human being with the intent

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to kill that person or another. In this case, first degree intentional homicide also requires that the defendant was not acting under the influence of adequate provocation.[1]

State's Burden of Proof

Before you may find the defendant may be found guilty of first degree intentional homicide, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following three elements were present.

Elements of the Crime that the State Must Prove

1. The defendant caused the death of (name of victim).

   "Cause" means that the defendant's act was a substantial factor in producing the death.[2]

2. The defendant acted with the intent to kill ((name of victim)) (another human being).[3]

3. The defendant did not act under the influence of adequate provocation.[4]

Meaning of "Intent to Kill"

"Intent to kill" means that the defendant had the mental purpose to take the life of another human being or was aware that (his) (her) conduct was practically certain to cause the death of another human being.[5]

When May Intent Exist?

While the law requires that the defendant acted with intent to kill, it does not require that the intent exist for any particular length of time before the act is committed. The act need not be brooded over, considered, or reflected upon for a week, a day, an hour, or even for a minute. There need not be any appreciable time between the formation of the intent and the act. The intent to kill may be formed at any time before the act, including the instant before the act, and must continue to exist at the time of the act.

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Deciding About Intent

You cannot look into a person's mind to find intent. Intent to kill must be found, if found at all, from the defendant's acts, words, and statements, if any, and from all the facts and circumstances in this case bearing upon intent.[6]

Intent and Motive

Intent should not be confused with motive. While proof of intent is necessary to a conviction, proof of motive is not. "Motive" refers to a person's reason for doing something. While motive may be shown as a circumstance to aid in establishing the guilt of a defendant, the State is not required to prove motive on the part of a defendant in order to convict. Evidence of motive does not by itself establish guilt. You should give it the weight you believe it deserves under all of the circumstances.

Adequate "Provocation"

The third element of first degree intentional homicide requires that the defendant did not act under the influence of adequate provocation.

"Provocation" means something the defendant reasonably believes the intended victim had done which caused the defendant to lose self-control completely at the time of causing death.[7] This requires that the defendant actually believed that there was provocation and that the defendant's belief was reasonable.

"Adequate" provocation means sufficient provocation to cause complete loss of self-control in an ordinary person.[8]

"Complete loss of self-control" is an extreme mental disturbance or emotional state. It is a state in which a person's ability to exercise judgment is overcome to the extent that the person acts uncontrollably. It is the highest degree of anger, rage, or exasperation.[9]

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To determine whether the defendant reasonably believed that there was provocation by the victim and whether an ordinary person would have lost self-control completely you should use the same standard. The standard is what a person of ordinary intelligence and prudence would have believed and whether that person would have completely lost self-control under the same circumstances.

Jury's Decision — First Degree Intentional Homicide

If you are satisfied beyond a reasonable doubt that the defendant caused the death of (name of victim) by an act committed with the intent to kill and that the defendant was not acting under the influence of adequate provocation, you should find the defendant guilty of first degree intentional homicide.

If you are not so satisfied, you must not find the defendant guilty of first degree intentional homicide, and you must consider whether the defendant is guilty of second degree intentional homicide in violation of section 940.05 of the Criminal Code of Wisconsin, which is a lesser included offense of first degree intentional homicide.

Make Every Reasonable Effort To Agree

You should make every reasonable effort to agree unanimously on the charge of first degree intentional homicide before considering the offense of second degree intentional homicide.[10] However, if after full and complete consideration of the evidence, you conclude that further deliberation would not result in unanimous agreement on the charge of first degree intentional homicide, you should consider whether the defendant is guilty of second degree intentional homicide.

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Statutory Definition of Second Degree Intentional Homicide

Second degree intentional homicide, as defined in § 940.05 of the Criminal Code of Wisconsin, is committed by one who causes the death of another human being with the intent to kill that person or another.

State's Burden of Proof

Before you may find the defendant guilty of second degree intentional homicide, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following two elements were present.

Elements of Second Degree Intentional Homicide That the State Must Prove

1. The defendant caused the death of (name of victim).
2. The defendant acted with the intent to kill ((name of victim)) (another human being).

"Cause" and "intent to kill" have already been defined for you.

The difference between first and second degree intentional homicide is that the first degree offense requires proof of one additional element: that the defendant was not acting under the influence of adequate provocation. Adequate provocation is not a defense to a charge of second degree intentional homicide.

Jury's Decision — Second Degree Intentional Homicide

If you are satisfied beyond a reasonable doubt that all the elements of first degree intentional homicide were present, except the element requiring that the defendant did not act under the influence of adequate provocation, you should find the defendant guilty of second degree intentional homicide.

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In other words, if you are satisfied beyond a reasonable doubt that the defendant caused the death of (name of victim) with the intent to kill,[11] you should find the defendant guilty of second degree intentional homicide.

If you are not so satisfied, you must find the defendant not guilty.

You are not, in any event, to find the defendant guilty of more than one of the foregoing offenses.

COMMENT

Wis JI-Criminal 1012 was originally published in 1989. This revision was approved by the Committee in October 2005 and involved adoption of a new format.

This instruction is for a case where first degree intentional homicide is charged, there is evidence of adequate provocation, and the lesser included offense of second degree intentional homicide is to be submitted to the jury. The statutes defining these offenses are among those created by 1987 Wisconsin Act 399 as part of the revision of the homicide statutes. The statute applies to offenses committed on or after January 1, 1989. [For a discussion of the homicide revision generally, and of the offenses covered by this instruction, see the Introductory Comment at Wis JI-Criminal 1000.]

1. When the issue of adequate provocation "has been placed in issue by the trial evidence, the state must prove beyond a reasonable doubt that the facts constituting the defense did not exist in order to sustain a finding of guilt" for a violation of § 940.01. § 940.01(3). This statute codifies prior Wisconsin law which had established that when evidence of a defense is in the case, the absence of that defense becomes a fact the state must prove to establish guilt for the crime charged.

A defense is "placed in issue" when "a reasonable view of the evidence could support a jury finding that the state has not borne its burden of disproving beyond a reasonable doubt the facts constituting the defense." Judicial Council Note to § 940.01, 1987 Senate Bill 191, citing State v. Felton, 110 Wis.2d 485, 508, 329 N.W.2d 161 (1983).

2. The Committee has concluded that the simple "substantial factor" definition of cause should be sufficient for most cases. Where there is evidence of more than one possible cause, something like the following might be added immediately preceding the sentence in the instruction beginning with "before":

> There may be more than one cause of death. The act of one person alone might produce it, or the acts of two or more persons might jointly produce it.

Also see Wis JI-Criminal 901, **CAUSE**.

3. The parenthetical reference to "another human being" is to be used in a case involving the common law doctrine of "transferred intent," which has been described as follows:

> It is immaterial that the human being killed is not the one the actor intended to kill. If X shoots at and kills a person who he thinks is Y but who is actually Z, X is as guilty as if he had not been mistaken about the identity of the person killed. The same is true where X shoots at Y intending

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to kill him, but he misses Y and kills Z. In both of these cases, X has caused "the death of another human being by an act done with intent to kill that person or another." In other words, the section incorporates the common law doctrine of "transferred intent." 1953 Judiciary Committee Report on the Criminal Code, Wisconsin Legislative Council, page 58.

4. See note 1, supra.

5. The phrase "or aware that his conduct is practically certain to cause that result" was added to the definition of "with intent to" found in § 939.23 by the 1988 revision of the homicide statutes. Further, the revision applied the § 939.23 definition to homicide offenses. Under prior law, "with intent to kill" was defined solely in terms of mental purpose for offenses in Chapter 940. See the discussion in Wis JI-Criminal 1000 and 923.2.

6. This is the shorter version used to describe the process of finding intent. The Committee has concluded that it is suitable for use in most cases. For the longer description of the intent-finding process, see Wis JI-Criminal 923A.

7. This paraphrases the statutory definition of "provocation" found in § 939.44(1)(b). No change in meaning is intended by substituting "lose" for "lack."

8. This paraphrases the statutory definition of "adequate" found in § 939.44(1)(a). No change in meaning is intended by substituting "loss" for "lack."

9. The explanation of "complete loss of self-control" is adapted from the description of "heat of passion" under prior law. See, e.g., Wis JI-Criminal 1130 (© 1982). "Adequate provocation" under § 939.44 is intended to be a codification of "Wisconsin decisions defining 'heat of passion' under prior s. 940.05." Judicial Council Note to § 939.44, 1987 Senate Bill 191, citing Ryan v. State, 115 Wis. 488, 92 N.W. 271 (1902); Johnson v. State, 129 Wis. 146, 108 N.W. 55 (1906); Carlone v. State, 150 Wis. 38, 136 N.W. 153 (1912); Zenou v. State, 4 Wis.2d 655, 91 N.W.2d 208 (1958); State v. Bond, 41 Wis.2d 219, 163 N.W.2d 601 (1969); State v. Williford, 103 Wis.2d 98, 307 N.W.2d 277 (1981).

10. This paragraph builds in the part of the transitional material usually used between the charged crime and the lesser included offense. See Wis JI-Criminal 112A.

11. A complete description of the jury's finding at this point would include reference to "adequate provocation" and would be phrased with a double negative: ". . . and you are not satisfied beyond a reasonable doubt that the defendant did not act under the influence of adequate provocation." The advantage in including such a statement is that it accurately identifies and emphasizes the difference between what is necessary for a finding of guilt on the first and second degree offenses. The disadvantage is that the double negative may be hard to understand. On balance, the Committee decided to leave it out of the text of the instruction, preserving it in this footnote for possible use if it is thought to be helpful.

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1014 FIRST DEGREE INTENTIONAL HOMICIDE: SELF-DEFENSE: SECOND DEGREE INTENTIONAL HOMICIDE — § 940.01(2)(b); § 940.05[1]

Crimes To Consider

The defendant in this case is charged with first degree intentional homicide, and you must first consider whether the defendant is guilty of that offense. If you are not satisfied that the defendant is guilty of first degree intentional homicide, you must consider whether or not the defendant is guilty of second degree intentional homicide which is a less serious degree of criminal homicide.

Intentional Homicide

The crimes referred to as first and second degree intentional homicide are different degrees of homicide. Homicide is the taking of the life of another human being. The degree of homicide defined by the law depends on the facts and circumstances of each particular case.

While the law separates intentional homicides into two degrees, there are certain elements which are common to each crime. Both first and second degree intentional homicide require that the defendant caused the death of the victim with the intent to kill. It will also be important for you to consider the privilege of self-defense in deciding which crime, if any, the defendant has committed.

Self-Defense

The Criminal Code of Wisconsin provides that a person is privileged to intentionally use force against another for the purpose of preventing or terminating what (he) (she) reasonably believes to be an unlawful interference with (his) (her) person by the other person. However,

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(he) (she) may intentionally use only such force as (he) (she) reasonably believes is necessary to prevent or terminate the interference. (He) (She) may not intentionally use force which is intended or likely to cause death unless (he) (she) reasonably believes that such force is necessary to prevent imminent death or great bodily harm to (himself) (herself).[2]

As applied to this case, the effect of the law of self-defense is:

- The defendant is not guilty of either first or second degree intentional homicide if the defendant reasonably believed that (he) (she) was preventing or terminating an unlawful interference with (his) (her) person, and reasonably believed the force used was necessary to prevent imminent death or great bodily harm to (himself) (herself).[3]
- The defendant is guilty of second degree intentional homicide if the defendant caused the death of (name of victim) with the intent to kill and actually believed the force used was necessary to prevent imminent death or great bodily harm to (himself) (herself), but the belief or the amount of force used was unreasonable.[4]
- The defendant is guilty of first degree intentional homicide if the defendant caused the death of (name of victim) with the intent to kill and did not actually believe the force used was necessary to prevent imminent death or great bodily harm to (himself) (herself).[5]

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Because the law provides that it is the State's burden to prove all the facts necessary to constitute a crime beyond a reasonable doubt, you will not be asked to make a separate finding on whether the defendant acted in self-defense. Instead, you will be asked to determine whether the State has established the necessary facts to justify a finding of guilty for first or second degree intentional homicide. If the State does not satisfy you that those facts are established by the evidence, you will be instructed to find the defendant not guilty.

The elements of each crime will now be defined for you in greater detail.

Statutory Definition of First Degree Intentional Homicide

First degree intentional homicide, as defined in § 940.01 of the Criminal Code of Wisconsin, is committed by one who causes the death of another human being with the intent to kill that person or another. In this case, first degree intentional homicide also requires that the defendant did not actually believe the force used was necessary to prevent imminent death or great bodily harm to himself.[6]

State's Burden of Proof

Before you may find the defendant guilty of first degree intentional homicide, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following three elements were present.

Elements of First Degree Intentional Homicide That the State Must Prove

1. The defendant caused the death of (name of victim).

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"Cause" means that the defendant's act was a substantial factor in producing the death.[7]

2. The defendant acted with the intent to kill ((name of victim)) (another human being).[8]

3. The defendant did not actually believe that the force used was necessary to prevent imminent death or great bodily harm to himself.[9]

Meaning of "Intent to Kill"

"Intent to kill" means that the defendant had the mental purpose to take the life of another human being or was aware that (his) (her) conduct was practically certain to cause the death of another human being.[10]

When May Intent Exist?

While the law requires that the defendant acted with intent to kill, it does not require that the intent exist for any particular length of time before the act is committed. The act need not be brooded over, considered, or reflected upon for a week, a day, an hour, or even for a minute. There need not be any appreciable time between the formation of the intent and the act. The intent to kill may be formed at any time before the act, including the instant before the act, and must continue to exist at the time of the act.

Deciding About Intent

You cannot look into a person's mind to find intent. Intent to kill must be found, if found at all, from the defendant's acts, words, and statements, if any, and from all the facts and circumstances in this case bearing upon intent.[11]

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Intent and Motive

Intent should not be confused with motive. While proof of intent is necessary to a conviction, proof of motive is not. "Motive" refers to a person's reason for doing something. While motive may be shown as a circumstance to aid in establishing the guilt of a defendant, the State is not required to prove motive on the part of a defendant in order to convict. Evidence of motive does not by itself establish guilt. You should give it the weight you believe it deserves under all of the circumstances.

Actual Belief That The Force Used Was Necessary

The third element of first degree intentional homicide requires that the defendant did not actually believe the force used was necessary to prevent imminent death or great bodily harm to (himself) (herself). This requires the State to prove[12] either:

1) that the defendant did not actually believe (he) (she) was in imminent danger of death or great bodily harm; or

2) that the defendant did not actually believe the force used was necessary to prevent imminent danger of death or great bodily harm to (himself) (herself).

When first degree intentional homicide is considered, the reasonableness of the defendant's belief is not an issue. You are to be concerned only with what the defendant actually believed. Whether these beliefs are reasonable is important only if you later consider whether the defendant is guilty of second degree intentional homicide.[13]

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Jury's Decision

If you are satisfied beyond a reasonable doubt that the defendant caused the death of (name of victim) with the intent to kill and that the defendant did not actually believe that the force used was necessary to prevent imminent death or great bodily harm to (himself) (herself), you should find the defendant guilty of first degree intentional homicide.

If you are not so satisfied, you must not find the defendant guilty of first degree intentional homicide, and you must consider whether the defendant is guilty of second degree intentional homicide, as defined in § 940.05 of the Criminal Code of Wisconsin, which is a lesser included offense of first degree intentional homicide.

Make Every Reasonable Effort To Agree

You should make every reasonable effort to agree unanimously on the charge of first degree intentional homicide before considering the offense of second degree intentional homicide.[14] However, if after full and complete consideration of the evidence, you conclude that further deliberation would not result in unanimous agreement on the charge of first degree intentional homicide, you should consider whether the defendant is guilty of second degree intentional homicide.

Second Degree Intentional Homicide

Before you may find the defendant guilty of second degree intentional homicide, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following three elements were present.

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Elements of Second Degree Intentional Homicide That the State Must Prove

1. The defendant caused the death of (name of victim).
2. The defendant acted with the intent to kill ((name of victim)) (another human being).
3. The defendant did not reasonably believe that (he) (she) was preventing or terminating an unlawful interference with (his) (her) person or did not reasonably believe that the force used was necessary to prevent imminent death or great bodily harm to (himself) (herself).[15]

You have already been instructed on the definitions of "causing death" and "with intent to kill." The same definitions apply to your consideration of second degree intentional homicide.

Reasonable Belief That The Force Used Was Necessary

The third element of second degree intentional homicide requires that the defendant did not reasonably believe that (he) (she) was preventing or terminating an unlawful interference with (his) (her) person or did not reasonably believe the force used was necessary to prevent imminent death or great bodily harm to (himself) (herself). This requires that the State prove any one of the following:[16]

1) that a reasonable person in the circumstances of the defendant would not have believed that (he) (she) was preventing or terminating an unlawful interference with (his) (her) person; or

2) that a reasonable person in the circumstances of the defendant would not have believed (he) (she) was in danger of imminent death or great bodily harm; or

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3) that a reasonable person in the circumstances of the defendant would not have believed that the amount of force used was necessary to prevent imminent death or great bodily harm to (himself) (herself).

The reasonableness of the defendant's belief must be determined from the standpoint of the defendant at the time of (his) (her) acts and not from the viewpoint of the jury now. The standard is what a person of ordinary intelligence and prudence would have believed in the position of the defendant under the circumstances existing at the time of the alleged offense.

Jury Decision

If you are satisfied beyond a reasonable doubt that the defendant caused the death of (name of victim) with the intent to kill and did not reasonably believe that (he) (she) was preventing or terminating an unlawful interference with (his) (her) person or did not reasonably believe the force used was necessary to prevent imminent death or great bodily harm to (himself) (herself), you should find the defendant guilty of second degree intentional homicide.

If you are not satisfied beyond a reasonable doubt that the defendant is guilty of second degree intentional homicide, you must find the defendant not guilty.

You are not, in any event, to find the defendant guilty of more than one of the foregoing offenses.

COMMENT

Wis JI-Criminal 1014 was originally published in 1988 and revised in 1991 and 1994. This revision was approved by the Committee in October 2002. It made changes required by State v. Head, 2002 WI 99, and adopted the new format.

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This instruction is drafted for a charge of first degree intentional homicide under § 940.01, where second degree intentional homicide in violation of § 940.05 is submitted as a lesser included offense. The statutes are among those created by 1987 Wisconsin Act 399 as part of the revision of the homicide statutes. The statutes apply to offenses committed on or after January 1, 1989. For a discussion of the homicide revision generally, and of the offense covered by this instruction, see the Introductory Comment at Wis JI-Criminal 1000.

1. This instruction is for a case where first degree intentional homicide is charged, there is evidence that the defendant acted in self-defense, and the lesser included offense of second degree intentional homicide is to be submitted to the jury.

2. These statements are based on the definition of the privilege of self-defense found in § 939.48.

3. The effect of the privilege of self-defense in a case where first degree intentional homicide is charged is as follows:

(a) if the exercise of the privilege was reasonable, both in inception and scope, the defendant is not guilty of any crime;

(b) if the defendant actually believed it was necessary to use force in self defense, but acts unreasonably, the defendant is guilty of second degree intentional homicide. He or she may act unreasonably in either of two ways:

i) the belief that it was necessary to act in self-defense may be unreasonable; or

ii) the amount of force used may be unreasonable

(c) if the defendant did not actually believe it was necessary to use force in self defense, the defendant is guilty of first degree intentional homicide.

4. Section 940.01(2)(b) provides that causing the death by "unnecessary defensive force" mitigates what would otherwise be first degree intentional homicide to second degree intentional homicide: "Death was caused because the actor believed he or she or another was in imminent danger of death or great bodily harm and that the force used was necessary to defend the endangered person, if either belief was unreasonable."

5. The absence of the mitigating circumstance — no actual belief that the force used was necessary to prevent imminent death or great bodily harm — becomes a fact necessary to constitute the first degree offense. See § 940.01(3) and State v. Head, 2002 WI 99, 255 Wis.2d 194, 648 N.W.2d 413. Also see the discussion in notes 12 and 13, below.

The Committee considered adding a "subjective threshold" to the definition of the mitigating circumstance. A "subjective threshold" would require that the defendant actually believed that there was an unlawful interference. The Head decision is unclear on this point. One statement in the opinion is consistent with adding this requirement:

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> . . . If unnecessary defensive force is been [sic] placed in issue by the trial evidence, the state must prove beyond a reasonable doubt that the defendant did not actually believe she was preventing or terminating an unlawful interference with her person or did not actually believe that the force she used was necessary to prevent imminent death or great bodily harm — even if those beliefs were unreasonable — to sustain a conviction for first-degree intentional homicide. 2002 WI 99, ¶70.

However, in two other paragraphs in the opinion the court stated the requirements for unnecessary defensive force without including the "actual belief in an unlawful interference" element. See 2002 WI 99, ¶¶5 and 90. Because § 940.01(2)(b) does not include this requirement, and because the Head decision placed great emphasis on the plain language of the statutes, the Committee decided that it should not be added to the instruction. As a practical matter, the requirement is probably implicit in the other aspects of the standard. Someone who actually believes that it is necessary to use force to prevent imminent death or great bodily harm almost certainly will believe that the source of that threat is an unlawful interference.

In State v. Peters, 2002 WI App 243, 258 Wis.2d 148, 653 N.W.2d 300, the court of appeals reversed a conviction for first degree intentional homicide because, under the standard set forth in the Head decision, second degree intentional homicide [unnecessary defensive force] and the complete privilege of self defense should have been submitted to the jury. As to unnecessary defensive force, Peters met the obligation set out in Head "to present only 'some' evidence that she actually believed that she was in imminent danger of death or great bodily harm and actually believed that the force she used was necessary to defend herself." 2002 WI App 243 at ¶19.

6. When the issue of self-defense "has been placed in issue by the trial evidence, the state must prove beyond a reasonable doubt that the facts constituting the defense did not exist in order to sustain a finding of guilt" for a violation of § 940.01. § 940.01(3). This statute codifies prior Wisconsin law which had established that when evidence of a defense is in the case, the absence of that defense becomes a fact the state must prove to establish guilt for the crime charged.

A defense is "placed in issue" when "a reasonable view of the evidence could support a jury finding that the state has not borne its burden of disproving beyond a reasonable doubt the facts constituting the defense." Judicial Council Note to § 940.01, 1987 Senate Bill 191, citing State v. Felton, 110 Wis.2d 485, 508, 329 N.W.2d 161 (1983).

7. The Committee has concluded that the simple "substantial factor" definition of cause should be sufficient for most cases. Where there is evidence of more than one possible cause, something like the following might be added:

> There may be more than one cause of death. The act of one person alone might produce it, or the acts of two or more persons might jointly produce it.

Also see Wis JI-Criminal 901, **CAUSE**.

8. The parenthetical reference to "another human being" is based on § 940.01(1), which addresses the common law doctrine of "transferred intent." That doctrine has been described as follows:

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It is immaterial that the human being killed is not the one the actor intended to kill. If X shoots at and kills a person who he thinks is Y but who is actually Z, X is as guilty as if he had not been mistaken about the identity of the person killed. The same is true where X shoots at Y intending to kill him, but he misses Y and kills Z. In both of these cases, X has caused "the death of another human being by an act done with intent to kill that person or another." In other words, the section incorporates the common law doctrine of "transferred intent." 1953 Judiciary Committee Report on the Criminal Code, Wisconsin Legislative Council, page 58.

9. See note 5, supra.

10. The phrase "or aware that his conduct is practically certain to cause that result" was added to the definition of "with intent to" found in § 939.23 by the 1988 revision of the homicide statutes. Further, the revision applied the § 939.23 definition to homicide offenses. Under prior law, "with intent to kill" was defined solely in terms of mental purpose for offenses in Chapter 940. See the discussion in Wis JI-Criminal 1000 and 923B.

11. This is the shorter version used to describe the process of finding intent. The Committee has concluded that it is suitable for use in most cases. For the longer description of the intent-finding process, see Wis JI-Criminal 923A.

12. Section 940.01(2) recognizes four circumstances as affirmative defenses which mitigate first degree intentional homicide to second degree intentional homicide. When the existence of an affirmative defense "has been placed in issue by the trial evidence, the state must prove beyond a reasonable doubt that the facts constituting the defense did not exist in order to sustain a finding of guilt" for a violation of § 940.01. See § 940.01(3). This statute codifies prior Wisconsin law which had established that when evidence of a defense is in the case, the absence of that defense becomes a fact the state must prove to establish guilt for the crime charged. Moes v. State, 91 Wis.2d 756, 284 N.W.2d 66 (1979).

A defense is "placed in issue" when "a reasonable view of the evidence could support a jury finding that the state has not borne its burden of disproving beyond a reasonable doubt the facts constituting the defense." Judicial Council Note to § 940.01, 1987 Senate Bill 191, citing State v. Felton, 110 Wis.2d 485, 508, 329 N.W.2d 161 (1983).

Two beliefs must be held by the defendant in order to mitigate first degree intentional homicide on the basis of "unnecessary defensive force": a belief that the defendant (or another) was in imminent danger of death or great bodily harm; and a belief that the force used was necessary to defend against that danger. See § 940.01(2)(b). By proving that the defendant did not actually hold either one of these beliefs, the state may meet its burden of proving that "the facts constituting the defense did not exist." Section 940.01(3).

13. The 2002 revision of the instruction changed this element in response to the decision in State v. Head, 2002 WI 99, 255 Wis.2d 194, 648 N.W.2d 413. Head modified State v. Camacho, 176 Wis.2d 860, 501 N.W.2d 380 (1993), by holding that there is no "objective threshold" for invoking the mitigating factor of "unnecessary defensive force." The "objective threshold" refers to a requirement that the defendant reasonably believe that he or she was preventing or terminating an unlawful interference. Head holds that it is sufficient for purposes of "unnecessary defensive force" that a defendant actually believe that the defensive force used was necessary. This is summarized in the following paragraphs of the opinion:

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¶103. Based on the plain language of Wis. Stat. § 940.05(2), supported by the legislative history and articulated public policy behind the statute, we conclude that when imperfect self-defense is placed in issue by the trial evidence, the state has the burden to prove that the person had no actual belief that she was in imminent danger of death or great bodily harm, or no actual belief that the amount of force she used was necessary to prevent or terminate this interference. If the jury concludes that the person had an actual but unreasonable belief that she was in imminent danger of death or great bodily harm, the person is not guilty of first-degree intentional homicide but should be found guilty of second-degree intentional homicide.

¶104. In light of this analysis, we must modify Camacho to the extent that it states that Wis. Stat. § 940.01(2)(b) contains an objective threshold element requiring a defendant to have a reasonable belief that she was preventing or terminating an unlawful interference with her person in order to raise the issue of unnecessary defensive force (imperfect self-defense).

Also see State v. Peters, 2002 WI App 243, note 5 supra.

14. This paragraph builds in part of the transitional material usually used between the charged crime and the lesser included offense. See Wis JI-Criminal 112.

15. The absence of the complete privilege of self-defense is a fact necessary to constitute the offense of second degree intentional homicide, assuming there is evidence of the complete privilege in the case. Since there already has been a finding of "some evidence" of the imperfect privilege, (now called "unnecessary defensive force"), there will almost always be a basis for submitting the existence of the complete privilege to the jury. See State v. Gomaz, 141 Wis.2d 302, 414 N.W.2d 626 (1987).

The 2002 revision of the instruction added the requirement that the "defendant did not reasonably believe that (he) (she) was preventing or terminating an unlawful interference." This requirement was previously part of the requirements for the mitigating factor of unnecessary defensive force. When State v. Head modified State v. Camacho, see note 13, supra, this "objective threshold" was removed from the mitigating factor determination. However, it remains part of the complete privilege of self defense and must be added here. Head's holding that the objective threshold does apply to claims of the complete privilege of self defense was stated as follows:

> . . . [A] defendant seeking a jury instruction on perfect self-defense to a charge of first-degree intentional homicide must satisfy an objective threshold showing that she reasonably believed that she was preventing or terminating an unlawful interference with her person and reasonably believed that the force she used was necessary to prevent imminent death or great bodily harm. A defendant is entitled to an instruction on perfect self-defense when the trial evidence places self-defense in issue. Perfect self-defense is placed in issue when, under a reasonable view of the trial evidence, a jury could conclude that the state has failed to meet its burden to disprove one of the elements of self-defense beyond a reasonable doubt. (Emphasis in original.) 2002 WI 99, ¶4.

In State v. Peters, 2002 WI App 243, 258 Wis.2d 148, 653 N.W.2d 300, the court of appeals reversed a conviction for first degree intentional homicide because, under the standard set forth in the Head decision, second degree intentional homicide [unnecessary defensive force] and the complete privilege of self defense

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should have been submitted to the jury. As to the complete privilege, Peters met the obligation set out in Head to present "some evidence" supporting the claim of self defense. "[V]iewing the evidence in the light most favorable to Peters, a jury could conclude the State had not disproved the perfect self-defense theory beyond a reasonable doubt and that Peters reasonably believed she was preventing or terminating an unlawful interference with her person and reasonably believed that the force she used was necessary to prevent imminent death or great bodily harm. 2002 WI App 243 at ¶24.

16. The exercise of the privilege may be proved to be unreasonable in any one of three ways: by showing that the defendant's belief that he or she was preventing or terminating an unlawful interference was unreasonable; or, by showing that the defendant's belief that he or she was in danger of imminent death or great bodily harm was unreasonable; or, by showing that the amount of force used was unreasonable. See note 15, supra.

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1015 FIRST DEGREE INTENTIONAL HOMICIDE: COERCION: SECOND DEGREE INTENTIONAL HOMICIDE — § 940.01(2)(d); § 940.05

Crimes To Consider

The defendant in this case is charged with first degree intentional homicide, and you must first consider whether the defendant is guilty of that offense. If you are not satisfied that the defendant is guilty of first degree intentional homicide, you must consider whether or not the defendant is guilty of second degree intentional homicide, which is a less serious degree of criminal homicide.

Intentional Homicide

The crimes referred to as first and second degree intentional homicide are different degrees of homicide. Homicide is the taking of the life of another human being. The degree of homicide defined by the law depends on the facts and circumstances of each particular case.

While the law separates intentional homicides into two degrees, there are certain elements which are common to each crime. Both first and second degree intentional homicide require that the defendant caused the death of the victim with the intent to kill. First degree intentional homicide requires the State to prove the additional fact that the defendant did not act under the defense of coercion. It is for you to decide of what degree of homicide the defendant is guilty, if guilty at all, according to the instructions which define the two degrees of intentional homicide.

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Statutory Definition of First Degree Intentional Homicide

First degree intentional homicide, as defined in § 940.01 of the Criminal Code of Wisconsin, is committed by one who causes the death of another human being with the intent to kill that person or another. In this case, first degree intentional homicide also requires that the defendant was not acting under the defense of coercion.[1]

State's Burden of Proof

Before you may find the defendant guilty of first degree intentional homicide, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following three elements were present.

Elements of the Crime that the State Must Prove

1. The defendant caused the death of (name of victim).

   "Cause" means that the defendant's act was a substantial factor in producing the death.[2]

2. The defendant acted with the intent to kill ((name of victim)) (another human being).[3]

3. The defendant did not act under the defense of coercion.[4]

Meaning of "Intent to Kill"

"Intent to kill" means that the defendant had the mental purpose to take the life of another human being or was aware that (his) (her) conduct was practically certain to cause the death of another human being.[5]

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When May Intent Exist?

While the law requires that the defendant acted with intent to kill, it does not require that the intent exist for any particular length of time before the act is committed. The act need not be brooded over, considered, or reflected upon for a week, a day, an hour, or even for a minute. There need not be any appreciable time between the formation of the intent and the act. The intent to kill may be formed at any time before the act, including the instant before the act, and must continue to exist at the time of the act.

Deciding About Intent

You cannot look into a person's mind to find intent. Intent to kill must be found, if found at all, from the defendant's acts, words, and statements, if any, and from all the facts and circumstances in this case bearing upon intent.[6]

Intent and Motive

Intent should not be confused with motive. While proof of intent is necessary to a conviction, proof of motive is not. "Motive" refers to a person's reason for doing something. While motive may be shown as a circumstance to aid in establishing the guilt of a defendant, the State is not required to prove motive on the part of a defendant in order to convict. Evidence of motive does not by itself establish guilt. You should give it the weight you believe it deserves under all of the circumstances.

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Coercion

The defense of coercion is an issue in this case. As applied to this case, coercion may reduce a charge of first degree intentional homicide to second degree intentional homicide.

The State must prove by evidence which satisfies you beyond a reasonable doubt that the defendant was not acting under the defense of coercion.[7]

The law allows the defendant to act under the defense of coercion only if a threat by another person (other than the defendant's co-conspirator)[8] caused the defendant to believe that (his) (her) act was the only means of preventing [imminent public disaster] [imminent death or great bodily harm to (himself) (herself) (or to others)][9] and which pressure caused (him) (her) to act as (he) (she) did.

In addition, the defendant's beliefs must have been reasonable. A belief may be reasonable even though mistaken. In determining whether the defendant's beliefs were reasonable, the standard is what a person of ordinary intelligence and prudence would have believed in the defendant's position under the circumstances that existed at the time of the alleged offense. The reasonableness of the defendant's beliefs must be determined from the standpoint of the defendant at the time of his acts and not from the viewpoint of the jury now.

Jury's Decision — First Degree Intentional Homicide

If you are satisfied beyond a reasonable doubt that the defendant caused the death of (name of victim) by an act committed with the intent to kill and that the defendant was not

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acting under the defense of coercion, you should find the defendant guilty of first degree intentional homicide.

If you are not so satisfied, you must not find the defendant guilty of first degree intentional homicide, and you must consider whether the defendant is guilty of second degree intentional homicide in violation of section 940.05 of the Criminal Code of Wisconsin, which is a lesser included offense of first degree intentional homicide.

Make Every Reasonable Effort To Agree

You should make every reasonable effort to agree unanimously on the charge of first degree intentional homicide before considering the offense of second degree intentional homicide.[10] However, if after full and complete consideration of the evidence, you conclude that further deliberation would not result in unanimous agreement on the charge of first degree intentional homicide, you should consider whether the defendant is guilty of second degree intentional homicide.

Statutory Definition of Second Degree Intentional Homicide

Second degree intentional homicide, as defined in § 940.05 of the Criminal Code of Wisconsin, is committed by one who causes the death of another human being with the intent to kill that person or another.

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State's Burden of Proof

Before you may find the defendant guilty of second degree intentional homicide, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following two elements were present.

Elements of Second Degree Intentional Homicide That the State Must Prove

1. The defendant caused the death of (name of victim).
2. The defendant acted with the intent to kill ((name of victim)) (another human being).

"Cause" and "intent to kill" have already been defined for you.

The difference between first and second degree intentional homicide is that the first degree offense requires proof of one additional element: that the defendant was not acting under the defense of coercion. Coercion is not a defense to a charge of second degree intentional homicide.

Jury's Decision — Second Degree Intentional Homicide

If you are satisfied beyond a reasonable doubt that all the elements of first degree intentional homicide were present, except the element requiring that the defendant did not act under the defense of coercion, you should find the defendant guilty of second degree intentional homicide.

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In other words, if you are satisfied beyond a reasonable doubt that the defendant caused the death of (name of victim) with the intent to kill,[11] you should find the defendant guilty of second degree intentional homicide.

If you are not so satisfied, you must find the defendant not guilty.

You are not, in any event, to find the defendant guilty of more than one of the foregoing offenses.

COMMENT

Wis JI-Criminal 1015 was approved by the Committee in March 2010.

This instruction is for a case where first degree intentional homicide is charged, there is evidence of coercion, and the lesser included offense of second degree intentional homicide is to be submitted to the jury. The statutes defining these offenses are among those created by 1987 Wisconsin Act 399 as part of the revision of the homicide statutes. The statute applies to offenses committed on or after January 1, 1989.

Identifying the statutory basis for the mitigating circumstance addressed by this instruction requires putting several separate statutes together. Section 940.01(2) identifies "affirmative defenses" to first degree intentional homicide "which mitigate the offense to 2nd-degree intentional homicide under s. 940.05." Subsection (d) of § 940.01(2) is titled "Coercion; necessity" and provides: "Death was caused in the exercise of a privilege under s. 939.45(1)." Section 939.45(1) provides that a privilege may be claimed "[w]hen the actor's conduct occurs under circumstances of coercion or necessity so as to be privileged under s. 939.46 or 939.47." Section 939.46 defines "coercion," providing that it is "a defense to a prosecution for any crime based on that act, except that if the prosecution is for first degree intentional homicide, the degree of the crime is reduced to 2nd-degree intentional homicide."

1. When the issue of coercion "has been placed in issue by the trial evidence, the state must prove beyond a reasonable doubt that the facts constituting the defense did not exist in order to sustain a finding of guilt" for a violation of § 940.01. § 940.01(3). This statute codifies prior Wisconsin law which had established that when evidence of a defense is in the case, the absence of that defense becomes a fact the state must prove to establish guilt for the crime charged. See, State v. Moes, 91 Wis.2d 756, 284 N.W.2d 66 (1979), which involved a coercion defense.

A defense is "placed in issue" when "a reasonable view of the evidence could support a jury finding that the state has not borne its burden of disproving beyond a reasonable doubt the facts constituting the defense." Judicial Council Note to § 940.01, 1987 Senate Bill 191, citing State v. Felton, 110 Wis.2d 485, 508, 329 N.W.2d 161 (1983).

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2. The Committee has concluded that the simple "substantial factor" definition of cause should be sufficient for most cases. Where there is evidence of more than one possible cause, something like the following might be added immediately preceding the sentence in the instruction beginning with "before":

> There may be more than one cause of death. The act of one person alone might produce it, or the acts of two or more persons might jointly produce it.

Also see Wis JI-Criminal 901, **CAUSE**.

3. The parenthetical reference to "another human being" is to be used in a case involving the common law doctrine of "transferred intent," which has been described as follows:

> It is immaterial that the human being killed is not the one the actor intended to kill. If X shoots at and kills a person who he thinks is Y but who is actually Z, X is as guilty as if he had not been mistaken about the identity of the person killed. The same is true where X shoots at Y intending to kill him, but he misses Y and kills Z. In both of these cases, X has caused "the death of another human being by an act done with intent to kill that person or another." In other words, the section incorporates the common law doctrine of "transferred intent." 1953 Judiciary Committee Report on the Criminal Code, Wisconsin Legislative Council, page 58.

4. See note 1, supra.

5. The phrase "or aware that his conduct is practically certain to cause that result" was added to the definition of "with intent to" found in § 939.23 by the 1988 revision of the homicide statutes. Further, the revision applied the § 939.23 definition to homicide offenses. Under prior law, "with intent to kill" was defined solely in terms of mental purpose for offenses in Chapter 940. See the discussion in Wis JI-Criminal 1000 and 923.2.

6. This is the shorter version used to describe the process of finding intent. The Committee has concluded that it is suitable for use in most cases. For the longer description of the intent-finding process, see Wis JI-Criminal 923A.

7. In Moes v. State, 91 Wis.2d 756, 284 N.W.2d 66 (1979), the Wisconsin Supreme Court held that the burden is on the state to disprove an asserted coercion defense beyond a reasonable doubt. Moes dealt with Wisconsin law as it existed before the 1989 homicide law revision. The procedure it recognized is consistent with that specified in § 940.01.

8. The threat must come from someone "other than the actor's co-conspirator." § 939.46(1). If there is an issue about the threat coming from a co-conspirator the phrase should be included in the instruction. It may also be appropriate to instruct the jury on the meaning of "co-conspirator." Wis JI-Criminal 570 defines the crime of "conspiracy."

9. The defense apparently applies where the threat is made to any third person, without limitation. In this respect, coercion has been likened to the defense of others under § 939.48(4), Wis. Stats. See 1950 Report on the Criminal Code of the Wisconsin Legislative Council, pages 35-36 and 38-39.

10. This paragraph builds in the part of the transitional material usually used between the charged crime and the lesser included offense. See Wis JI-Criminal 112A.

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11. A complete description of the jury's finding at this point would include reference to "coercion" and would be phrased with a double negative: ". . . and you are not satisfied beyond a reasonable doubt that the defendant did not act lawfully under the defense of coercion." The advantage in including such a statement is that it accurately identifies and emphasizes the difference between what is necessary for a finding of guilt on the first and second degree offenses. The disadvantage is that the double negative may be hard to understand. On balance, the Committee decided to leave it out of the text of the instruction, preserving it in this footnote for possible use if it is thought to be helpful.

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1016 FIRST DEGREE INTENTIONAL HOMICIDE: SELF-DEFENSE: SECOND DEGREE INTENTIONAL HOMICIDE: FIRST DEGREE RECKLESS HOMICIDE — § 940.01(2)(b); § 940.05; § 940.02(1)[1]

Crimes To Consider

The defendant in this case is charged with first degree intentional homicide, and you must first consider whether the defendant is guilty of that offense. If you are not satisfied that the defendant is guilty of first degree intentional homicide, you must consider whether or not the defendant is guilty of second degree intentional homicide or first degree reckless homicide which are less serious degrees of criminal homicide.

Intentional and Reckless Homicide

The crimes referred to as first and second degree intentional homicide and first degree reckless homicide are different degrees of homicide. Homicide is the taking of the life of another human being. The degree of homicide defined by the law depends on the facts and circumstances of each particular case.

While the law separates homicides into different types and degrees, there are certain elements which are common to each crime. Both intentional and reckless homicide require that the defendant caused the death of the victim. First and second degree intentional homicide require the State to prove the additional fact that the defendant acted with the intent to kill. First degree reckless homicide requires that the defendant acted recklessly, under circumstances which show utter disregard for human life. It will also be important for you

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to consider the privilege of self-defense in deciding which crime, if any, the defendant has committed.

Self-Defense

The Criminal Code of Wisconsin provides that a person is privileged to intentionally use force against another for the purpose of preventing or terminating what (he) (she) reasonably believes to be an unlawful interference with (his) (her) person by the other person. However, (he) (she) may intentionally use only such force as (he) (she) reasonably believes is necessary to prevent or terminate the interference. (He) (She) may not intentionally use force which is intended or likely to cause death unless (he) (she) reasonably believes that such force is necessary to prevent imminent death or great bodily harm to (himself) (herself).[2]

As applied to this case, the effect of the law of self-defense is:

- The defendant is not guilty of any homicide offense if the defendant reasonably believed that (he) (she) was preventing or terminating an unlawful interference with (his) (her) person, and reasonably believed the force used was necessary to prevent imminent death or great bodily harm to (himself) (herself).[3]
- The defendant is guilty of second degree intentional homicide if the defendant caused the death of (name of victim) with the intent to kill and actually believed the force used was necessary to prevent imminent death

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or great bodily harm to (himself) (herself), but the belief or the amount of force used was unreasonable.[4]

- The defendant is guilty of first degree intentional homicide if the defendant caused the death of (name of victim) with the intent to kill and did not actually believe the force used was necessary to prevent imminent death or great bodily harm to (himself) (herself).[5]
- The defendant is guilty of first degree reckless homicide if the defendant caused the death of (name of victim) by criminally reckless conduct and the circumstances of the conduct showed utter disregard for human life. You will be asked to consider the privilege of self-defense in deciding whether the elements of first degree reckless homicide are present.[6]

Because the law provides that it is the State's burden to prove all the facts necessary to constitute a crime beyond a reasonable doubt, you will not be asked to make a separate finding on whether the defendant acted in self-defense. Instead, you will be asked to determine whether the State has established the necessary facts to justify a finding of guilty for first or second degree intentional homicide or for first degree reckless homicide. If the State does not satisfy you that those facts are established by the evidence, you will be instructed to find the defendant not guilty.

The facts necessary to constitute each crime will now be defined for you in greater detail.

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Statutory Definition of First Degree Intentional Homicide

First degree intentional homicide, as defined in § 940.01 of the Criminal Code of Wisconsin, is committed by one who causes the death of another human being with the intent to kill that person or another. In this case, first degree intentional homicide also requires that the defendant did not actually believe the force used was necessary to prevent imminent death or great bodily harm to himself.[7]

State's Burden of Proof

Before you may find the defendant guilty of first degree intentional homicide, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following three elements were present.

Elements of First Degree Intentional Homicide That the State Must Prove

1. The defendant caused the death of (name of victim).

   "Cause" means that the defendant's act was a substantial factor in producing the death.[8]

2. The defendant acted with the intent to kill ((name of victim)) (another human being).[9]

3. The defendant did not actually believe that the force used was necessary to prevent imminent death or great bodily harm to himself.[10]

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Meaning of "Intent to Kill"

"Intent to kill" means that the defendant had the mental purpose to take the life of another human being or was aware that (his) (her) conduct was practically certain to cause the death of another human being.[11]

When May Intent Exist?

While the law requires that the defendant acted with intent to kill, it does not require that the intent exist for any particular length of time before the act is committed. The act need not be brooded over, considered, or reflected upon for a week, a day, an hour, or even for a minute. There need not be any appreciable time between the formation of the intent and the act. The intent to kill may be formed at any time before the act, including the instant before the act, and must continue to exist at the time of the act.

Deciding About Intent

You cannot look into a person's mind to find intent. Intent to kill must be found, if found at all, from the defendant's acts, words, and statements, if any, and from all the facts and circumstances in this case bearing upon intent.[12]

Intent and Motive

Intent should not be confused with motive. While proof of intent is necessary to a conviction, proof of motive is not. "Motive" refers to a person's reason for doing something. While motive may be shown as a circumstance to aid in establishing the guilt of a defendant, the State is not required to prove motive on the part of a defendant in order to convict.

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Evidence of motive does not by itself establish guilt. You should give it the weight you believe it deserves under all of the circumstances.

Actual Belief That The Force Used Was Necessary

The third element of first degree intentional homicide requires that the defendant did not actually believe the force used was necessary to prevent imminent death or great bodily harm to (himself) (herself). This requires the State to prove[13] either:

1) that the defendant did not actually believe (he) (she) was in imminent danger of death or great bodily harm; or

2) that the defendant did not actually believe the force used was necessary to prevent imminent danger of death or great bodily harm to (himself) (herself).

When first degree intentional homicide is considered, the reasonableness of the defendant's belief is not an issue. You are to be concerned only with what the defendant actually believed. Whether these beliefs are reasonable is important only if you later consider whether the defendant is guilty of second degree intentional homicide.[14]

Jury's Decision

If you are satisfied beyond a reasonable doubt that the defendant caused the death of (name of victim) with the intent to kill and that the defendant did not actually believe that the force used was necessary to prevent imminent death or great bodily harm to (himself) (herself), you should find the defendant guilty of first degree intentional homicide.

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If you are not so satisfied, you must not find the defendant guilty of first degree intentional homicide, and you must consider whether the defendant is guilty of second degree intentional homicide, as defined in § 940.05 of the Criminal Code of Wisconsin, which is a lesser included offense of first degree intentional homicide.

Make Every Reasonable Effort To Agree

You should make every reasonable effort to agree unanimously on the charge of first degree intentional homicide before considering the offense of second degree intentional homicide.[15] However, if after full and complete consideration of the evidence, you conclude that further deliberation would not result in unanimous agreement on the charge of first degree intentional homicide, you should consider whether the defendant is guilty of second degree intentional homicide.

Second Degree Intentional Homicide

Before you may find the defendant guilty of second degree intentional homicide, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following three elements were present.

Elements of Second Degree Intentional Homicide That the State Must Prove

1. The defendant caused the death of (name of victim).
2. The defendant acted with the intent to kill ((name of victim)) (another human being).

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3. The defendant did not reasonably believe that (he) (she) was preventing or terminating an unlawful interference with (his) (her) person or did not reasonably believe that the force used was necessary to prevent imminent death or great bodily harm to (himself) (herself).[16]

You have already been instructed on the definitions of "causing death" and "with intent to kill." The same definitions apply to your consideration of second degree intentional homicide.

Reasonable Belief That The Force Used Was Necessary

The third element of second degree intentional homicide requires that the defendant did not reasonably believe that (he) (she) was preventing or terminating an unlawful interference with (his) (her) person or did not reasonably believe the force used was necessary to prevent imminent death or great bodily harm to (himself) (herself). This requires that the State prove any one of the following:[17]

1) that a reasonable person in the circumstances of the defendant would not have believed that (he) (she) was preventing or terminating an unlawful interference with (his) (her) person; or

2) that a reasonable person in the circumstances of the defendant would not have believed (he) (she) was in danger of imminent death or great bodily harm; or

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3) that a reasonable person in the circumstances of the defendant would not have believed that the amount of force used was necessary to prevent imminent death or great bodily harm to (himself) (herself).

The reasonableness of the defendant's belief must be determined from the standpoint of the defendant at the time of (his) (her) acts and not from the viewpoint of the jury now. The standard is what a person of ordinary intelligence and prudence would have believed in the position of the defendant under the circumstances existing at the time of the alleged offense.

Jury Decision

If you are satisfied beyond a reasonable doubt that the defendant caused the death of (name of victim) with the intent to kill and did not reasonably believe that (he) (she) was preventing or terminating an unlawful interference with (his) (her) person or did not reasonably believe the force used was necessary to prevent imminent death or great bodily harm to (himself) (herself), you should find the defendant guilty of second degree intentional homicide.

If you are not so satisfied, you must not find the defendant guilty of second degree intentional homicide, and you should consider whether the defendant is guilty of first degree reckless homicide, in violation of § 940.02 of the Criminal Code of Wisconsin, which is also a lesser included offense of first degree intentional homicide.

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Make Every Reasonable Effort To Agree

You should make every reasonable effort to agree unanimously on the charge of second degree intentional homicide before considering the offense of first degree reckless homicide.[18] However, if after full and complete consideration of the evidence, you conclude that further deliberation would not result in unanimous agreement on the charge of second degree intentional homicide, you should consider whether the defendant is guilty of first degree reckless homicide.

Statutory Definition of First Degree Reckless Homicide

First degree reckless homicide, as defined in § 940.02(1) of the Criminal Code of Wisconsin, is committed by one who recklessly causes the death of another human being under circumstances that show utter disregard for human life.

State's Burden Of Proof

Before you may find the defendant guilty of first degree reckless homicide, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following three elements were present.

Elements of the Crime That the State Must Prove

1. The defendant caused the death of (name of victim).

   "Cause" means that the defendant's act was a substantial factor in producing the death.[19]

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2. The defendant caused the death by criminally reckless conduct.

"Criminally reckless conduct" means:[20]

- the conduct created a risk of death or great bodily harm to another person; and
- the risk of death or great bodily harm was unreasonable and substantial; and
- the defendant was aware that (his) (her) conduct created the unreasonable and substantial risk of death or great bodily harm.[21]

You should consider the evidence relating to self-defense in deciding whether the defendant's conduct created an unreasonable risk to another. If the defendant was acting lawfully in self-defense, (his) (her) conduct did not create an unreasonable risk to another. The burden is on the state to prove beyond a reasonable doubt that the defendant did not act lawfully in self-defense. And, you must be satisfied beyond a reasonable doubt from all the evidence in the case that the risk was unreasonable.[22]

3. The circumstances of the defendant's conduct showed utter disregard[23] for human life.

In determining whether the circumstances of the conduct showed utter disregard for human life, consider these factors: what the defendant was doing; why the defendant was engaged in that conduct; how dangerous the conduct was; how obvious the danger was; whether the conduct showed any regard for life;[24] and, all other facts and circumstances relating to the conduct. You should consider the

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evidence relating to self-defense in deciding whether the circumstances of the defendant's conduct showed utter disregard for human life. The burden is on the state to prove beyond a reasonable doubt that the defendant did not act lawfully in self-defense. And, you must be satisfied beyond a reasonable doubt from all the evidence in the case that the circumstances of the defendant's conduct showed utter disregard for human life.[25]

ADD THE FOLLOWING IF EVIDENCE OF THE DEFENDANT'S AFTER-THE-FACT CONDUCT HAS BEEN ADMITTED.[26]

[Consider also the defendant's conduct after the death to the extent that it helps you decide whether or not the circumstances showed utter disregard for human life at the time the death occurred.]

Jury's Decision

If you are satisfied beyond a reasonable doubt that the defendant caused the death of (name of victim) by criminally reckless conduct and that the circumstances of the conduct showed utter disregard for human life, you should find the defendant guilty of first degree reckless homicide.

If you are not so satisfied, you must find the defendant not guilty.

You are not, in any event, to find the defendant guilty of more than one of the foregoing offenses.

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COMMENT

Wis JI-Criminal 1016 was originally published in March 1991 and revised in 1993, 2003, 2012, and 2014. The 2003 revision made changes in the treatment of self-defense required by State v. Head, 2002 WI 99, and adopted the new format. The 2012 revision involved adding footnote 26 and the text accompanying it. The 2014 revision added to the text to reflect the decision in State v. Austin, 2013 WI App 96, 349 Wis.2d 744, 836 N.W.2d 833. See footnotes 22 and 25. This revision was approved by the Committee in March 2015; it revised footnote 21 to reflect 2013 Wisconsin Act 307.

This instruction is for a case where first degree intentional homicide in violation of § 940.01 is charged and lesser included offenses defined in §§ 940.02 and 940.05 are submitted. The statutes are among those created by 1987 Wisconsin Act 399 as part of the revision of the homicide statutes. The statute applies to offenses committed on or after January 1, 1989. For a brief overview of the homicide revision, see the Introductory Comment at Wis JI-Criminal 1000. A comprehensive outline and discussion of the changes can be found in "The Importance of Clarity in the Law of Homicide: The Wisconsin Revision," by Walter Dickey, David Schultz, and James L. Fullin, Jr., 1989 Wisconsin Law Review 1325.

1. This instruction is for a case where first degree intentional homicide is charged, there is evidence that the defendant acted in self-defense, and the lesser included offenses of second degree intentional homicide and first degree reckless homicide are to be submitted to the jury.

2. These statements are based on the definition of the privilege of self-defense found in § 939.48.

3. The effect of the privilege of self-defense in a case where first degree intentional homicide is charged is as follows:

(a) if the exercise of the privilege was reasonable, both in inception and scope, the defendant is not guilty of any crime;

(b) if the defendant actually believed it was necessary to use force in self defense, but acts unreasonably, the defendant is guilty of second degree intentional homicide. He or she may act unreasonably in either of two ways:

i) the belief that it was necessary to act in self-defense may be unreasonable; or

ii) the amount of force used may be unreasonable

(c) if the defendant did not actually believe it was necessary to use force in self defense, the defendant is guilty of first degree intentional homicide.

4. Section 940.01(2)(b) provides that causing the death by "unnecessary defensive force" mitigates what would otherwise be first degree intentional homicide to second degree intentional homicide: "Death was caused because the actor believed he or she or another was in imminent danger of death or great bodily harm and that the force used was necessary to defend the endangered person, if either belief was unreasonable."

5. The absence of the mitigating circumstance — no actual belief that the force used was necessary to prevent imminent death or great bodily harm — becomes a fact necessary to constitute the first degree

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offense. See § 940.01(3) and State v. Head, 2002 WI 99, 255 Wis.2d 194, 648 N.W.2d 413. Also see the discussion in notes 13 and 14, below.

The Committee considered adding a "subjective threshold" to the definition of the mitigating circumstance. A "subjective threshold" would require that the defendant actually believed that there was an unlawful interference. The Head decision is unclear on this point. One statement in the opinion is consistent with adding this requirement:

> . . . If unnecessary defensive force is been [sic] placed in issue by the trial evidence, the state must prove beyond a reasonable doubt that the defendant did not actually believe she was preventing or terminating an unlawful interference with her person or did not actually believe that the force she used was necessary to prevent imminent death or great bodily harm — even if those beliefs were unreasonable — to sustain a conviction for first-degree intentional homicide. 2002 WI 99, ¶70.

However, in two other paragraphs in the opinion the court stated the requirements for unnecessary defensive force without including the "actual belief in an unlawful interference" element. See 2002 WI 99, ¶¶5 and 90. Because § 940.01(2)(b) does not include this requirement, and because the Head decision placed great emphasis on the plain language of the statutes, the Committee decided that it should not be added to the instruction. As a practical matter, the requirement is probably implicit in the other aspects of the standard. Someone who actually believes that it is necessary to use force to prevent imminent death or great bodily harm almost certainly will believe that the source of that threat is an unlawful interference.

In State v. Peters, 2002 WI App 243, 258 Wis.2d 148, 653 N.W.2d 300, the court of appeals reversed a conviction for first degree intentional homicide because, under the standard set forth in the Head decision, second degree intentional homicide [unnecessary defensive force] and the complete privilege of self defense should have been submitted to the jury. As to unnecessary defensive force, Peters met the obligation set out in Head "to present only 'some' evidence that she actually believed that she was in imminent danger of death or great bodily harm and actually believed that the force she used was necessary to defend herself." 2002 WI App 243 at ¶19.

6. See notes 22 and 25, below.

7. When the issue of self-defense "has been placed in issue by the trial evidence, the state must prove beyond a reasonable doubt that the facts constituting the defense did not exist in order to sustain a finding of guilt" for a violation of § 940.01. § 940.01(3). This statute codifies prior Wisconsin law which had established that when evidence of a defense is in the case, the absence of that defense becomes a fact the state must prove to establish guilt for the crime charged.

A defense is "placed in issue" when "a reasonable view of the evidence could support a jury finding that the state has not borne its burden of disproving beyond a reasonable doubt the facts constituting the defense." Judicial Council Note to § 940.01, 1987 Senate Bill 191, citing State v. Felton, 110 Wis.2d 485, 508, 329 N.W.2d 161 (1983).

8. The Committee has concluded that the simple "substantial factor" definition of cause should be sufficient for most cases. Where there is evidence of more than one possible cause, something like the following might be added:

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> There may be more than one cause of death. The act of one person alone might produce it, or the acts of two or more persons might jointly produce it.

Also see Wis JI-Criminal 901, **CAUSE**.

9. The parenthetical reference to "another human being" is based on § 940.01(1), which addresses the common law doctrine of "transferred intent." That doctrine has been described as follows:

> It is immaterial that the human being killed is not the one the actor intended to kill. If X shoots at and kills a person who he thinks is Y but who is actually Z, X is as guilty as if he had not been mistaken about the identity of the person killed. The same is true where X shoots at Y intending to kill him, but he misses Y and kills Z. In both of these cases, X has caused "the death of another human being by an act done with intent to kill that person or another." In other words, the section incorporates the common law doctrine of "transferred intent." 1953 Judiciary Committee Report on the Criminal Code, Wisconsin Legislative Council, page 58.

10. See note 5, supra.

11. The phrase "or aware that his conduct is practically certain to cause that result" was added to the definition of "with intent to" found in § 939.23 by the 1988 revision of the homicide statutes. Further, the revision applied the § 939.23 definition to homicide offenses. Under prior law, "with intent to kill" was defined solely in terms of mental purpose for offenses in Chapter 940. See the discussion in Wis JI-Criminal 1000 and 923B.

12. This is the shorter version used to describe the process of finding intent. The Committee has concluded that it is suitable for use in most cases. For the longer description of the intent-finding process, see Wis JI-Criminal 923A.

13. Section 940.01(2) recognizes four circumstances as affirmative defenses which mitigate first degree intentional homicide to second degree intentional homicide. When the existence of an affirmative defense "has been placed in issue by the trial evidence, the state must prove beyond a reasonable doubt that the facts constituting the defense did not exist in order to sustain a finding of guilt" for a violation of § 940.01. See § 940.01(3). This statute codifies prior Wisconsin law which had established that when evidence of a defense is in the case, the absence of that defense becomes a fact the state must prove to establish guilt for the crime charged. Moes v. State, 91 Wis.2d 756, 284 N.W.2d 66 (1979).

A defense is "placed in issue" when "a reasonable view of the evidence could support a jury finding that the state has not borne its burden of disproving beyond a reasonable doubt the facts constituting the defense." Judicial Council Note to § 940.01, 1987 Senate Bill 191, citing State v. Felton, 110 Wis.2d 485, 508, 329 N.W.2d 161 (1983).

Two beliefs must be held by the defendant in order to mitigate first degree intentional homicide on the basis of "unnecessary defensive force": a belief that the defendant (or another) was in imminent danger of death or great bodily harm; and a belief that the force used was necessary to defend against that danger. See § 940.01(2)(b). By proving that the defendant did not actually hold either one of these beliefs, the state may meet its burden of proving that "the facts constituting the defense did not exist." Section 940.01(3).

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14. The 2002 revision of the instruction changed this element in response to the decision in State v. Head, 2002 WI 99, 255 Wis.2d 194, 648 N.W.2d 413. Head modified State v. Camacho, 176 Wis.2d 860, 501 N.W.2d 380 (1993), by holding that there is no "objective threshold" for invoking the mitigating factor of "unnecessary defensive force." The "objective threshold" refers to a requirement that the defendant reasonably believe that he or she was preventing or terminating an unlawful interference. Head holds that it is sufficient for purposes of "unnecessary defensive force" that a defendant actually believe that the defensive force used was necessary. This is summarized in the following paragraphs of the opinion:

> ¶103. Based on the plain language of Wis. Stat. § 940.05(2), supported by the legislative history and articulated public policy behind the statute, we conclude that when imperfect self-defense is placed in issue by the trial evidence, the state has the burden to prove that the person had no actual belief that she was in imminent danger of death or great bodily harm, or no actual belief that the amount of force she used was necessary to prevent or terminate this interference. If the jury concludes that the person had an actual but unreasonable belief that she was in imminent danger of death or great bodily harm, the person is not guilty of first-degree intentional homicide but should be found guilty of second-degree intentional homicide.
>
> ¶104. In light of this analysis, we must modify Camacho to the extent that it states that Wis. Stat. § 940.01(2)(b) contains an objective threshold element requiring a defendant to have a reasonable belief that she was preventing or terminating an unlawful interference with her person in order to raise the issue of unnecessary defensive force (imperfect self-defense).

Also see State v. Peters, 2002 WI App 243, note 5 supra.

15. This paragraph builds in part of the transitional material usually used between the charged crime and the lesser included offense. See Wis JI-Criminal 112.

16. The absence of the complete privilege of self-defense is a fact necessary to constitute the offense of second degree intentional homicide, assuming there is evidence of the complete privilege in the case. Since there already has been a finding of "some evidence" of the imperfect privilege, (now called "unnecessary defensive force"), there will almost always be a basis for submitting the existence of the complete privilege to the jury. See State v. Gomaz, 141 Wis.2d 302, 414 N.W.2d 626 (1987).

The 2002 revision of the instruction added the requirement that the "defendant did not reasonably believe that (he) (she) was preventing or terminating an unlawful interference." This requirement was previously part of the requirements for the mitigating factor of unnecessary defensive force. When State v. Head modified State v. Camacho, see note 14, supra, this "objective threshold" was removed from the mitigating factor determination. However, it remains part of the complete privilege of self defense and must be added here. Head's holding that the objective threshold does apply to claims of the complete privilege of self defense was stated as follows:

> . . . [A] defendant seeking a jury instruction on perfect self-defense to a charge of first-degree intentional homicide must satisfy an objective threshold showing that she reasonably believed that she was preventing or terminating an unlawful interference with her person and reasonably believed that the force she used was necessary to prevent imminent death or great bodily harm. A defendant is entitled to an instruction on perfect self-defense when the trial evidence places self-defense in issue. Perfect self-defense is placed in issue when, under a reasonable view of the

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trial evidence, a jury could conclude that the state has failed to meet its burden to disprove one of the elements of self-defense beyond a reasonable doubt. (Emphasis in original.) 2002 WI 99, ¶4.

In State v. Peters, 2002 WI App 243, 258 Wis.2d 148, 653 N.W.2d 300, the court of appeals reversed a conviction for first degree intentional homicide because, under the standard set forth in the Head decision, second degree intentional homicide [unnecessary defensive force] and the complete privilege of self defense should have been submitted to the jury. As to the complete privilege, Peters met the obligation set out in Head to present "some evidence" supporting the claim of self defense. "[V]iewing the evidence in the light most favorable to Peters, a jury could conclude the State had not disproved the perfect self-defense theory beyond a reasonable doubt and that Peters reasonably believed she was preventing or terminating an unlawful interference with her person and reasonably believed that the force she used was necessary to prevent imminent death or great bodily harm." 2002 WI App 243 at ¶24.

17. The exercise of the privilege may be proved to be unreasonable in any one of three ways: by showing that the defendant's belief that he or she was preventing or terminating an unlawful interference was unreasonable; or, by showing that the defendant's belief that he or she was in danger of imminent death or great bodily harm was unreasonable; or, by showing that the amount of force used was unreasonable. See note 16, supra.

18. This paragraph builds in part of the transitional material usually used between the charged crime and the lesser included offense. See Wis JI-Criminal 112.

19. The Committee has concluded that the simple "substantial factor" definition of cause should be sufficient for most cases. Where there is evidence of more than one possible cause, something like the following might be added immediately preceding the sentence in the instruction beginning with "before":

> There may be more than one cause of death. The act of one person alone might produce it, or the acts of two or more persons might jointly produce it.

Also see, Wis JI-Criminal 901 Cause.

20. "Criminal recklessness" is defined as follows in § 939.24(1):

> . . . 'criminal recklessness' means that the actor creates an unreasonable and substantial risk of death or great bodily harm to another human being and the actor is aware of that risk.

The Judicial Council Note to § 939.24, 1987 Senate Bill 191, explains that "[r]ecklessness requires both the creation of an objectively unreasonable and substantial risk of human death or great bodily harm and the actor's subjective awareness of that risk."

21. The statutory definition of "recklessness" clarifies that subjective awareness of the risk is required. That raises the possibility that intoxication could, as a factual matter, negate awareness of the risk. For that reason, the original definition of recklessness provided that if voluntary intoxication prevented the actor from being aware of the risk, it was not a defense. This rule was set forth in § 939.24(3):

> (3) A voluntarily produced intoxicated or drugged condition is not a defense to liability for criminal recklessness if, had the actor not been in that condition, he or she would have been aware of creating an unreasonable and substantial risk of death or great bodily harm to another human being.

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The Judicial Council Note to subsection (3) explains it as follows:

> Subsection (3) continues the present rule that a voluntarily produced intoxicated or drugged condition is not a defense to liability for criminal recklessness. Ameen v. State, 51 Wis.2d 175, 185, 186 N.W.2d 206 (1971). Patterned on s. 2.08 of the model penal code, it premises liability on whether the actor would have been aware if not in such condition of the risk of death or great bodily harm. The commentaries to s. 2.08, model penal code, state the rationale of this rule in extended fashion.

Note to § 939.24(3), 1987 Senate Bill 191.

Section 939.42, the statute codifying both voluntary and involuntary intoxication defenses, was revised by 2013 Wisconsin Act 307 [effective date: April 18, 2014]. Reference to voluntary intoxication was eliminated; as amended, the statute refers only to involuntary intoxication. Act 307 also repealed former sub. (3) of § 939.24, thus getting rid of the special rule excluding voluntary intoxication as a defense to the "aware of the risk" element. For cases arising before the effective date of Act 307, the suggestion included in the previous version of this Comment would still apply: "In a case where there is evidence of intoxication, it may be helpful to advise the jury of the rule provided in subsection (3). The Committee concluded that simply reading the statute is the best way to provide the necessary information.

22. The Committee has concluded that consideration of the privilege of self-defense is relevant to both the "unreasonable risk" and "utter disregard" components of first degree reckless homicide. Conduct does not create an unreasonable risk of harm to another if the conduct is undertaken as reasonable action in self-defense. Recklessness and reasonable exercise of the privilege cannot coexist. Thus, the Committee concluded that it is best to advise the jury to consider the privilege of self-defense when considering the "unreasonable risk" component of recklessness.

The last two sentences of this paragraph were added in 2014 in response to the decision in State v. Austin, 2013 WI App 96, 349 Wis.2d 744, 836 N.W.2d 833, in which the court of appeals ordered a new trial for a person convicted of 2nd degree recklessly endangering safety. The court held that the jury instructions given in that case — which followed the pattern suggested by Wis JI-Criminal 801 — were deficient because they did not specifically state that the prosecution must prove the absence of self-defense once raised. The first of the added sentences is intended to make that requirement clear. The second added sentence is intended to emphasize that even if the state succeeds in proving the absence of self-defense, the jury still must be satisfied by all the evidence that the defendant's conduct created an unreasonable risk of death or great bodily harm.

23. "Under circumstances which show utter disregard for human life" is the factor that distinguishes this offense from second degree reckless homicide. For a complete discussion of this factor, see Wis JI-Criminal 924A or note 4, Wis JI-Criminal 1020.

24. All the circumstances relating to the defendant's conduct should be considered in determining whether that conduct shows "utter disregard" for human life. See Wis JI-Criminal 924A or note 5, Wis JI-Criminal 1020.

25. The Committee has concluded that consideration of the privilege of self-defense is relevant to both the "unreasonable risk" and "utter disregard" components of first degree reckless homicide. Conduct does not show utter disregard for human life if it is undertaken on the reasonable exercise of the privilege of

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self-defense. Thus, the Committee concluded that it is best to advise the jury to consider the privilege of self-defense when considering the "utter disregard" element.

The last two sentences of this paragraph were added in 2014 in response to the decision in State v. Austin, see note 22, supra. Austin was concerned with the "unreasonable risk" element of the offense, but the same concern should apply to the "utter disregard" element of 1st degree reckless offenses. The first of the added sentences is intended to make it clear that the prosecution must prove the absence of self-defense once raised to meet its burden to prove "utter disregard for human life." The second added sentence is intended to emphasize that even if the state succeeds in proving the absence of self-defense, the jury still must be satisfied by all the evidence that circumstances of the defendant's conduct showed utter disregard for human life.

26. This material was added in 2011 in response to the decision of the Wisconsin Supreme Court in State v. Burris, 2011 WI 32, 333 Wis.2d 87, 797 N.W.2d 430. For a complete discussion of this issue, see Wis JI-Criminal 924A or note 6, Wis JI-Criminal 1020.

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1017 FIRST DEGREE INTENTIONAL HOMICIDE: SELF-DEFENSE: SECOND DEGREE INTENTIONAL HOMICIDE: FIRST DEGREE RECKLESS HOMICIDE: SECOND DEGREE RECKLESS HOMICIDE — § 940.01(2)(b); § 940.05; § 940.02(1); § 940.06[1]

Crimes To Consider

The defendant in this case is charged with first degree intentional homicide, and you must first consider whether the defendant is guilty of that offense. If you are not satisfied that the defendant is guilty of first degree intentional homicide, you must consider whether or not the defendant is guilty of second degree intentional homicide or first degree reckless homicide or second degree reckless homicide which are less serious degrees of criminal homicide.

Intentional and Reckless Homicide

The crimes referred to as first and second degree intentional homicide and first and second degree reckless homicide are different degrees of homicide. Homicide is the taking of the life of another human being. The degree of homicide defined by the law depends on the facts and circumstances of each particular case.

While the law separates homicides into different types and degrees, there are certain elements which are common to each crime. Both intentional and reckless homicide require that the defendant caused the death of the victim. First and second degree intentional homicide require the State to prove the additional fact that the defendant acted with the intent to kill. First and second degree reckless homicide require that the defendant acted recklessly. First degree reckless homicide requires proof of one additional element: that the

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circumstances of the defendant's conduct showed utter disregard for human life. It will also be important for you to consider the privilege of self-defense in deciding which crime, if any, the defendant has committed.

Self-Defense

The Criminal Code of Wisconsin provides that a person is privileged to intentionally use force against another for the purpose of preventing or terminating what (he) (she) reasonably believes to be an unlawful interference with (his) (her) person by the other person. However, (he) (she) may intentionally use only such force as (he) (she) reasonably believes is necessary to prevent or terminate the interference. (He) (She) may not intentionally use force which is intended or likely to cause death unless (he) (she) reasonably believes that such force is necessary to prevent imminent death or great bodily harm to (himself) (herself).[2]

As applied to this case, the effect of the law of self-defense is:

- The defendant is not guilty of any homicide offense if the defendant reasonably believed that (he) (she) was preventing or terminating an unlawful interference with (his) (her) person, and reasonably believed the force used was necessary to prevent imminent death or great bodily harm to (himself) (herself).[3]
- The defendant is guilty of second degree intentional homicide if the defendant caused the death of (name of victim) with the intent to kill and

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actually believed the force used was necessary to prevent imminent death or great bodily harm to (himself) (herself), but the belief or the amount of force used was unreasonable.[4]

- The defendant is guilty of first degree intentional homicide if the defendant caused the death of (name of victim) with the intent to kill and did not actually believe the force used was necessary to prevent imminent death or great bodily harm to (himself) (herself).[5]
- The defendant is guilty of first degree reckless homicide if the defendant caused the death of (name of victim) by criminally reckless conduct and the circumstances of the conduct showed utter disregard for human life.
- The defendant is guilty of second degree reckless homicide if the defendant caused the death of (name of victim) by criminally reckless conduct.

You will be asked to consider the privilege of self-defense in deciding whether the elements of first and second degree reckless homicide are present.[6]

Because the law provides that it is the State's burden to prove all the facts necessary to constitute a crime beyond a reasonable doubt, you will not be asked to make a separate finding on whether the defendant acted in self-defense. Instead, you will be asked to determine whether the State has established the necessary facts to justify a finding of guilty for first or second degree intentional homicide or for first or second degree reckless

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homicide. If the State does not satisfy you that those facts are established by the evidence, you will be instructed to find the defendant not guilty.

The facts necessary to constitute each crime will now be defined for you in greater detail.

Statutory Definition of First Degree Intentional Homicide

First degree intentional homicide, as defined in § 940.01 of the Criminal Code of Wisconsin, is committed by one who causes the death of another human being with the intent to kill that person or another. In this case, first degree intentional homicide also requires that the defendant did not actually believe the force used was necessary to prevent imminent death or great bodily harm to himself.[7]

State's Burden of Proof

Before you may find the defendant guilty of first degree intentional homicide, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following three elements were present.

Elements of First Degree Intentional Homicide That the State Must Prove

1. The defendant caused the death of (name of victim).

   "Cause" means that the defendant's act was a substantial factor in producing the death.[8]

2. The defendant acted with the intent to kill ((name of victim)) (another human being).[9]

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3. The defendant did not actually believe that the force used was necessary to prevent imminent death or great bodily harm to himself.[10]

Meaning of "Intent to Kill"

"Intent to kill" means that the defendant had the mental purpose to take the life of another human being or was aware that (his) (her) conduct was practically certain to cause the death of another human being.[11]

When May Intent Exist?

While the law requires that the defendant acted with intent to kill, it does not require that the intent exist for any particular length of time before the act is committed. The act need not be brooded over, considered, or reflected upon for a week, a day, an hour, or even for a minute. There need not be any appreciable time between the formation of the intent and the act. The intent to kill may be formed at any time before the act, including the instant before the act, and must continue to exist at the time of the act.

Deciding About Intent

You cannot look into a person's mind to find intent. Intent to kill must be found, if found at all, from the defendant's acts, words, and statements, if any, and from all the facts and circumstances in this case bearing upon intent.[12]

Intent and Motive

Intent should not be confused with motive. While proof of intent is necessary to a conviction, proof of motive is not. "Motive" refers to a person's reason for doing something.

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While motive may be shown as a circumstance to aid in establishing the guilt of a defendant, the State is not required to prove motive on the part of a defendant in order to convict. Evidence of motive does not by itself establish guilt. You should give it the weight you believe it deserves under all of the circumstances.

Actual Belief That The Force Used Was Necessary

The third element of first degree intentional homicide requires that the defendant did not actually believe the force used was necessary to prevent imminent death or great bodily harm to (himself) (herself). This requires the State to prove[13] either:

1) that the defendant did not actually believe (he) (she) was in imminent danger of death or great bodily harm; or

2) that the defendant did not actually believe the force used was necessary to prevent imminent danger of death or great bodily harm to (himself) (herself).

When first degree intentional homicide is considered, the reasonableness of the defendant's belief is not an issue. You are to be concerned only with what the defendant actually believed. Whether these beliefs are reasonable is important only if you later consider whether the defendant is guilty of second degree intentional homicide.[14]

Jury's Decision

If you are satisfied beyond a reasonable doubt that the defendant caused the death of (name of victim) with the intent to kill and that the defendant did not actually believe that

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the force used was necessary to prevent imminent death or great bodily harm to (himself) (herself), you should find the defendant guilty of first degree intentional homicide.

If you are not so satisfied, you must not find the defendant guilty of first degree intentional homicide, and you must consider whether the defendant is guilty of second degree intentional homicide, as defined in § 940.05 of the Criminal Code of Wisconsin, which is a lesser included offense of first degree intentional homicide.

Make Every Reasonable Effort To Agree

You should make every reasonable effort to agree unanimously on the charge of first degree intentional homicide before considering the offense of second degree intentional homicide.[15] However, if after full and complete consideration of the evidence, you conclude that further deliberation would not result in unanimous agreement on the charge of first degree intentional homicide, you should consider whether the defendant is guilty of second degree intentional homicide.

Second Degree Intentional Homicide

Before you may find the defendant guilty of second degree intentional homicide, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following three elements were present.

Elements of Second Degree Intentional Homicide That the State Must Prove

1. The defendant caused the death of (name of victim).

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2. The defendant acted with the intent to kill ((name of victim)) (another human being).

3. The defendant did not reasonably believe that (he) (she) was preventing or terminating an unlawful interference with (his) (her) person or did not reasonably believe that the force used was necessary to prevent imminent death or great bodily harm to (himself) (herself).[16]

You have already been instructed on the definitions of "causing death" and "with intent to kill." The same definitions apply to your consideration of second degree intentional homicide.

Reasonable Belief That The Force Used Was Necessary

The third element of second degree intentional homicide requires that the defendant did not reasonably believe that (he) (she) was preventing or terminating an unlawful interference with (his) (her) person or did not reasonably believe the force used was necessary to prevent imminent death or great bodily harm to (himself) (herself). This requires that the State prove any one of the following:[17]

1) that a reasonable person in the circumstances of the defendant would not have believed that (he) (she) was preventing or terminating an unlawful interference with (his) (her) person; or

2) that a reasonable person in the circumstances of the defendant would not have believed (he) (she) was in danger of imminent death or great bodily harm; or

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3) that a reasonable person in the circumstances of the defendant would not have believed that the amount of force used was necessary to prevent imminent death or great bodily harm to (himself) (herself).

The reasonableness of the defendant's belief must be determined from the standpoint of the defendant at the time of (his) (her) acts and not from the viewpoint of the jury now. The standard is what a person of ordinary intelligence and prudence would have believed in the position of the defendant under the circumstances existing at the time of the alleged offense.

Jury Decision

If you are satisfied beyond a reasonable doubt that the defendant caused the death of (name of victim) with the intent to kill and did not reasonably believe that (he) (she) was preventing or terminating an unlawful interference with (his) (her) person or did not reasonably believe the force used was necessary to prevent imminent death or great bodily harm to (himself) (herself), you should find the defendant guilty of second degree intentional homicide.

If you are not so satisfied, you must not find the defendant guilty of second degree intentional homicide, and you should consider whether the defendant is guilty of first degree reckless homicide, in violation of § 940.02 of the Criminal Code of Wisconsin, which is also a lesser included offense of first degree intentional homicide.

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Make Every Reasonable Effort To Agree

You should make every reasonable effort to agree unanimously on the charge of second degree intentional homicide before considering the offense of first degree reckless homicide.[18] However, if after full and complete consideration of the evidence, you conclude that further deliberation would not result in unanimous agreement on the charge of second degree intentional homicide, you should consider whether the defendant is guilty of first degree reckless homicide.

Statutory Definition of First Degree Reckless Homicide

First degree reckless homicide, as defined in § 940.02(1) of the Criminal Code of Wisconsin, is committed by one who recklessly causes the death of another human being under circumstances that show utter disregard for human life.

State's Burden Of Proof

Before you may find the defendant guilty of first degree reckless homicide, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following three elements were present.

Elements of the Crime That the State Must Prove

1. The defendant caused the death of (name of victim).

   "Cause" means that the defendant's act was a substantial factor in producing the death.[19]

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2. The defendant caused the death by criminally reckless conduct.

"Criminally reckless conduct" means:[20]

- the conduct created a risk of death or great bodily harm to another person; and
- the risk of death or great bodily harm was unreasonable and substantial; and
- the defendant was aware that (his) (her) conduct created the unreasonable and substantial risk of death or great bodily harm.[21]

You should consider the evidence relating to self-defense in deciding whether the defendant's conduct created an unreasonable risk to another. If the defendant was acting lawfully in self-defense, (his) (her) conduct did not create an unreasonable risk to another. The burden is on the state to prove beyond a reasonable doubt that the defendant did not act lawfully in self-defense. And, you must be satisfied beyond a reasonable doubt from all the evidence in the case that the risk was unreasonable.[22]

3. The circumstances of the defendant's conduct showed utter disregard[23] for human life.

In determining whether the circumstances of the conduct showed utter disregard for human life, consider these factors: what the defendant was doing; why the defendant was engaged in that conduct; how dangerous the conduct was; how obvious the danger was; whether the conduct showed any regard for life;[24] and, all other facts and circumstances relating to the conduct. You should consider the

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evidence relating to self-defense in deciding whether the circumstances of the defendant's conduct showed utter disregard for human life. The burden is on the state to prove beyond a reasonable doubt that the defendant did not act lawfully in self-defense. And, you must be satisfied beyond a reasonable doubt from all the evidence in the case that the circumstances of the defendant's conduct showed utter disregard for human life.[25]

ADD THE FOLLOWING IF EVIDENCE OF THE DEFENDANT'S AFTER-THE-FACT CONDUCT HAS BEEN ADMITTED.[26]

[Consider also the defendant's conduct after the death to the extent that it helps you decide whether or not the circumstances showed utter disregard for human life at the time the death occurred.]

Jury's Decision

If you are satisfied beyond a reasonable doubt that the defendant caused the death of (name of victim) by criminally reckless conduct and that the circumstances of the conduct showed utter disregard for human life, you should find the defendant guilty of first degree reckless homicide.

If you are not so satisfied, you must not find the defendant guilty of first degree reckless homicide, and you should consider whether the defendant is guilty of second degree reckless homicide, in violation of § 940.06 of the Criminal Code of Wisconsin, which is a lesser included offense of first degree reckless homicide.

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Make Every Reasonable Effort To Agree

You should make every reasonable effort to agree unanimously on the charge of first degree reckless homicide before considering the offense of second degree reckless homicide.[27] However, if after full and complete consideration of the evidence, you conclude that further deliberation would not result in unanimous agreement on the charge of first degree reckless homicide, you should consider whether the defendant is guilty of second degree reckless homicide.

Statutory Definition of Second Degree Reckless Homicide

Second degree reckless homicide, as defined in § 940.06 of the Criminal Code of Wisconsin, is committed by one who recklessly causes the death of another human being.

Difference Between First and Second Degree Reckless Homicide

The difference between first and second degree reckless homicide is that the first degree offense requires proof of one additional element: that the circumstances of the defendant's conduct showed utter disregard for human life.[28]

Jury Decision

If you are satisfied beyond a reasonable doubt that all the elements of first degree reckless homicide were present, except the element requiring that the circumstances of the conduct showed utter disregard for human life, you should find the defendant guilty of second degree reckless homicide.

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In other words, if you are satisfied beyond a reasonable doubt that the defendant caused the death of (name of victim) by criminally reckless conduct, you should find the defendant guilty of second degree reckless homicide.

If you are not so satisfied, you must find the defendant not guilty.

You are not, in any event, to find the defendant guilty of more than one of the foregoing offenses.

COMMENT

Wis JI-Criminal 1017 was originally published in March 1991 and revised in 1993, 2003, 2012, and 2014. The 2003 revision made changes in the treatment of self-defense required by State v. Head, 2002 WI 99, and adopted the new format. The 2012 revision involved adding footnote 26 and the text accompanying it. The 2014 revision added to the text to reflect the decision in State v. Austin, 2013 WI App 96, 349 Wis.2d 744, 836 N.W.2d 833. See footnotes 22 and 25. This revision was approved by the Committee in March 2015; it revised footnote 21 to reflect 2013 Wisconsin Act 307.

This instruction is for a case where first degree intentional homicide in violation of § 940.01 is charged and lesser included offenses defined in §§ 940.02, 940.05, and 940.06 are submitted. The statutes are among those created by 1987 Wisconsin Act 399 as part of the revision of the homicide statutes. The statute applies to offenses committed on or after January 1, 1989. For a brief overview of the homicide revision, see the Introductory Comment at Wis JI-Criminal 1000. A comprehensive outline and discussion of the changes can be found in "The Importance of Clarity in the Law of Homicide: The Wisconsin Revision," by Walter Dickey, David Schultz, and James L. Fullin, Jr., 1989 Wisconsin Law Review 1325.

1. This instruction is for a case where first degree intentional homicide is charged, there is evidence that the defendant acted in self-defense, and the lesser included offenses of second degree intentional homicide and first and second degree reckless homicide are to be submitted to the jury.

2. These statements are based on the definition of the privilege of self-defense found in § 939.48.

3. The effect of the privilege of self-defense in a case where first degree intentional homicide is charged is as follows:

(a) if the exercise of the privilege was reasonable, both in inception and scope, the defendant is not guilty of any crime;

(b) if the defendant actually believed it was necessary to use force in self defense, but acts unreasonably, the defendant is guilty of second degree intentional homicide. He or she may act unreasonably in either of two ways:

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i) the belief that it was necessary to act in self-defense may be unreasonable; or

ii) the amount of force used may be unreasonable

(c) if the defendant did not actually believe it was necessary to use force in self defense, the defendant is guilty of first degree intentional homicide.

4. Section 940.01(2)(b) provides that causing the death by "unnecessary defensive force" mitigates what would otherwise be first degree intentional homicide to second degree intentional homicide: "Death was caused because the actor believed he or she or another was in imminent danger of death or great bodily harm and that the force used was necessary to defend the endangered person, if either belief was unreasonable."

5. The absence of the mitigating circumstance — no actual belief that the force used was necessary to prevent imminent death or great bodily harm — becomes a fact necessary to constitute the first degree offense. See § 940.01(3) and State v. Head, 2002 WI 99, 255 Wis.2d 194, 648 N.W.2d 413. Also see the discussion in notes 13 and 14, below.

The Committee considered adding a "subjective threshold" to the definition of the mitigating circumstance. A "subjective threshold" would require that the defendant actually believed that there was an unlawful interference. The Head decision is unclear on this point. One statement in the opinion is consistent with adding this requirement:

> . . . If unnecessary defensive force is been [sic] placed in issue by the trial evidence, the state must prove beyond a reasonable doubt that the defendant did not actually believe she was preventing or terminating an unlawful interference with her person or did not actually believe that the force she used was necessary to prevent imminent death or great bodily harm — even if those beliefs were unreasonable — to sustain a conviction for first-degree intentional homicide. 2002 WI 99, ¶70.

However, in two other paragraphs in the opinion the court stated the requirements for unnecessary defensive force without including the "actual belief in an unlawful interference" element. See 2002 WI 99, ¶¶5 and 90. Because § 940.01(2)(b) does not include this requirement, and because the Head decision placed great emphasis on the plain language of the statutes, the Committee decided that it should not be added to the instruction. As a practical matter, the requirement is probably implicit in the other aspects of the standard. Someone who actually believes that it is necessary to use force to prevent imminent death or great bodily harm almost certainly will believe that the source of that threat is an unlawful interference.

In State v. Peters, 2002 WI App 243, 258 Wis.2d 148, 653 N.W.2d 300, the court of appeals reversed a conviction for first degree intentional homicide because, under the standard set forth in the Head decision, second degree intentional homicide [unnecessary defensive force] and the complete privilege of self defense should have been submitted to the jury. As to unnecessary defensive force, Peters met the obligation set out in Head "to present only 'some' evidence that she actually believed that she was in imminent danger of death or great bodily harm and actually believed that the force she used was necessary to defend herself." 2002 WI App 243 at ¶19.

6. See notes 22 and 25, below.

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7. When the issue of self-defense "has been placed in issue by the trial evidence, the state must prove beyond a reasonable doubt that the facts constituting the defense did not exist in order to sustain a finding of guilt" for a violation of § 940.01. § 940.01(3). This statute codifies prior Wisconsin law which had established that when evidence of a defense is in the case, the absence of that defense becomes a fact the state must prove to establish guilt for the crime charged.

A defense is "placed in issue" when "a reasonable view of the evidence could support a jury finding that the state has not borne its burden of disproving beyond a reasonable doubt the facts constituting the defense." Judicial Council Note to § 940.01, 1987 Senate Bill 191, citing State v. Felton, 110 Wis.2d 485, 508, 329 N.W.2d 161 (1983).

8. The Committee has concluded that the simple "substantial factor" definition of cause should be sufficient for most cases. Where there is evidence of more than one possible cause, something like the following might be added:

> There may be more than one cause of death. The act of one person alone might produce it, or the acts of two or more persons might jointly produce it.

Also see Wis JI-Criminal 901, **CAUSE**.

9. The parenthetical reference to "another human being" is based on § 940.01(1), which addresses the common law doctrine of "transferred intent." That doctrine has been described as follows:

> It is immaterial that the human being killed is not the one the actor intended to kill. If X shoots at and kills a person who he thinks is Y but who is actually Z, X is as guilty as if he had not been mistaken about the identity of the person killed. The same is true where X shoots at Y intending to kill him, but he misses Y and kills Z. In both of these cases, X has caused "the death of another human being by an act done with intent to kill that person or another." In other words, the section incorporates the common law doctrine of "transferred intent." 1953 Judiciary Committee Report on the Criminal Code, Wisconsin Legislative Council, page 58.

10. See note 5, supra.

11. The phrase "or aware that his conduct is practically certain to cause that result" was added to the definition of "with intent to" found in § 939.23 by the 1988 revision of the homicide statutes. Further, the revision applied the § 939.23 definition to homicide offenses. Under prior law, "with intent to kill" was defined solely in terms of mental purpose for offenses in Chapter 940. See the discussion in Wis JI-Criminal 1000 and 923B.

12. This is the shorter version used to describe the process of finding intent. The Committee has concluded that it is suitable for use in most cases. For the longer description of the intent-finding process, see Wis JI-Criminal 923A.

13. Section 940.01(2) recognizes four circumstances as affirmative defenses which mitigate first degree intentional homicide to second degree intentional homicide. When the existence of an affirmative defense "has been placed in issue by the trial evidence, the state must prove beyond a reasonable doubt that the facts constituting the defense did not exist in order to sustain a finding of guilt" for a violation of § 940.01. See § 940.01(3). This statute codifies prior Wisconsin law which had established that when evidence of a

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defense is in the case, the absence of that defense becomes a fact the state must prove to establish guilt for the crime charged. Moes v. State, 91 Wis.2d 756, 284 N.W.2d 66 (1979).

A defense is "placed in issue" when "a reasonable view of the evidence could support a jury finding that the state has not borne its burden of disproving beyond a reasonable doubt the facts constituting the defense." Judicial Council Note to § 940.01, 1987 Senate Bill 191, citing State v. Felton, 110 Wis.2d 485, 508, 329 N.W.2d 161 (1983).

Two beliefs must be held by the defendant in order to mitigate first degree intentional homicide on the basis of "unnecessary defensive force": a belief that the defendant (or another) was in imminent danger of death or great bodily harm; and a belief that the force used was necessary to defend against that danger. See § 940.01(2)(b). By proving that the defendant did not actually hold either one of these beliefs, the state may meet its burden of proving that "the facts constituting the defense did not exist." Section 940.01(3).

14. The 2002 revision of the instruction changed this element in response to the decision in State v. Head, 2002 WI 99, 255 Wis.2d 194, 648 N.W.2d 413. Head modified State v. Camacho, 176 Wis.2d 860, 501 N.W.2d 380 (1993), by holding that there is no "objective threshold" for invoking the mitigating factor of "unnecessary defensive force." The "objective threshold" refers to a requirement that the defendant reasonably believe that he or she was preventing or terminating an unlawful interference. Head holds that it is sufficient for purposes of "unnecessary defensive force" that a defendant actually believe that the defensive force used was necessary. This is summarized in the following paragraphs of the opinion:

> ¶103. Based on the plain language of Wis. Stat. § 940.05(2), supported by the legislative history and articulated public policy behind the statute, we conclude that when imperfect self-defense is placed in issue by the trial evidence, the state has the burden to prove that the person had no actual belief that she was in imminent danger of death or great bodily harm, or no actual belief that the amount of force she used was necessary to prevent or terminate this interference. If the jury concludes that the person had an actual but unreasonable belief that she was in imminent danger of death or great bodily harm, the person is not guilty of first-degree intentional homicide but should be found guilty of second-degree intentional homicide.
>
> ¶104. In light of this analysis, we must modify Camacho to the extent that it states that Wis. Stat. § 940.01(2)(b) contains an objective threshold element requiring a defendant to have a reasonable belief that she was preventing or terminating an unlawful interference with her person in order to raise the issue of unnecessary defensive force (imperfect self-defense).

Also see State v. Peters, 2002 WI App 243, note 5, supra.

15. This paragraph builds in part of the transitional material usually used between the charged crime and the lesser included offense. See Wis JI-Criminal 112.

16. The absence of the complete privilege of self-defense is a fact necessary to constitute the offense of second degree intentional homicide, assuming there is evidence of the complete privilege in the case. Since there already has been a finding of "some evidence" of the imperfect privilege, (now called "unnecessary defensive force"), there will almost always be a basis for submitting the existence of the complete privilege to the jury. See State v. Gomaz, 141 Wis.2d 302, 414 N.W.2d 626 (1987).

The 2002 revision of the instruction added the requirement that the "defendant did not reasonably believe that (he) (she) was preventing or terminating an unlawful interference." This requirement was

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previously part of the requirements for the mitigating factor of unnecessary defensive force. When State v. Head modified State v. Camacho, see note 14, supra, this "objective threshold" was removed from the mitigating factor determination. However, it remains part of the complete privilege of self defense and must be added here. Head's holding that the objective threshold does apply to claims of the complete privilege of self defense was stated as follows:

> . . . [A] defendant seeking a jury instruction on perfect self-defense to a charge of first-degree intentional homicide must satisfy an objective threshold showing that she reasonably believed that she was preventing or terminating an unlawful interference with her person and reasonably believed that the force she used was necessary to prevent imminent death or great bodily harm. A defendant is entitled to an instruction on perfect self-defense when the trial evidence places self-defense in issue. Perfect self-defense is placed in issue when, under a reasonable view of the trial evidence, a jury could conclude that the state has failed to meet its burden to disprove one of the elements of self-defense beyond a reasonable doubt. (Emphasis in original.) 2002 WI 99, ¶4.

In State v. Peters, 2002 WI App 243, 258 Wis.2d 148, 653 N.W.2d 300, the court of appeals reversed a conviction for first degree intentional homicide because, under the standard set forth in the Head decision, second degree intentional homicide [unnecessary defensive force] and the complete privilege of self defense should have been submitted to the jury. As to the complete privilege, Peters met the obligation set out in Head to present "some evidence" supporting the claim of self defense. "[V]iewing the evidence in the light most favorable to Peters, a jury could conclude the State had not disproved the perfect self-defense theory beyond a reasonable doubt and that Peters reasonably believed she was preventing or terminating an unlawful interference with her person and reasonably believed that the force she used was necessary to prevent imminent death or great bodily harm." 2002 WI App 243 at ¶24.

17. The exercise of the privilege may be proved to be unreasonable in any one of three ways: by showing that the defendant's belief that he or she was preventing or terminating an unlawful interference was unreasonable; or, by showing that the defendant's belief that he or she was in danger of imminent death or great bodily harm was unreasonable; or, by showing that the amount of force used was unreasonable. See note 16, supra.

18. This paragraph builds in part of the transitional material usually used between the charged crime and the lesser included offense. See Wis JI-Criminal 112.

19. The Committee has concluded that the simple "substantial factor" definition of cause should be sufficient for most cases. Where there is evidence of more than one possible cause, something like the following might be added immediately preceding the sentence in the instruction beginning with "before":

> There may be more than one cause of death. The act of one person alone might produce it, or the acts of two or more persons might jointly produce it.

Also see, Wis JI-Criminal 901 Cause.

20. "Criminal recklessness" is defined as follows in § 939.24(1):

> . . . 'criminal recklessness' means that the actor creates an unreasonable and substantial risk of death or great bodily harm to another human being and the actor is aware of that risk.

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The Judicial Council Note to § 939.24, 1987 Senate Bill 191, explains that "[r]ecklessness requires both the creation of an objectively unreasonable and substantial risk of human death or great bodily harm and the actor's subjective awareness of that risk."

21. The statutory definition of "recklessness" clarifies that subjective awareness of the risk is required. That raises the possibility that intoxication could, as a factual matter, negate awareness of the risk. For that reason, the original definition of recklessness provided that if voluntary intoxication prevented the actor from being aware of the risk, it was not a defense. This rule was set forth in § 939.24(3):

> (3) A voluntarily produced intoxicated or drugged condition is not a defense to liability for criminal recklessness if, had the actor not been in that condition, he or she would have been aware of creating an unreasonable and substantial risk of death or great bodily harm to another human being.

The Judicial Council Note to subsection (3) explains it as follows:

> Subsection (3) continues the present rule that a voluntarily produced intoxicated or drugged condition is not a defense to liability for criminal recklessness. Ameen v. State, 51 Wis.2d 175, 185, 186 N.W.2d 206 (1971). Patterned on s. 2.08 of the model penal code, it premises liability on whether the actor would have been aware if not in such condition of the risk of death or great bodily harm. The commentaries to s. 2.08, model penal code, state the rationale of this rule in extended fashion.

Note to § 939.24(3), 1987 Senate Bill 191.

Section 939.42, the statute codifying both voluntary and involuntary intoxication defenses, was revised by 2013 Wisconsin Act 307 [effective date: April 18, 2014]. Reference to voluntary intoxication was eliminated; as amended, the statute refers only to involuntary intoxication. Act 307 also repealed former sub. (3) of § 939.24, thus getting rid of the special rule excluding voluntary intoxication as a defense to the "aware of the risk" element. For cases arising before the effective date of Act 307, the suggestion included in the previous version of this Comment would still apply: "In a case where there is evidence of intoxication, it may be helpful to advise the jury of the rule provided in subsection (3). The Committee concluded that simply reading the statute is the best way to provide the necessary information.

22. The Committee has concluded that consideration of the privilege of self-defense is relevant to both the "unreasonable risk" and "utter disregard" components of first degree reckless homicide. Conduct does not create an unreasonable risk of harm to another if the conduct is undertaken as reasonable action in self-defense. Recklessness and reasonable exercise of the privilege cannot coexist. Thus, the Committee concluded that it is best to advise the jury to consider the privilege of self-defense when considering the "unreasonable risk" component of recklessness.

The last two sentences of this paragraph were added in 2014 in response to the decision in State v. Austin, 2013 WI App 96, 349 Wis.2d 744, 836 N.W.2d 833, in which the court of appeals ordered a new trial for a person convicted of 2nd degree recklessly endangering safety. The court held that the jury instructions given in that case — which followed the pattern suggested by Wis JI-Criminal 801 — were deficient because they did not specifically state that the prosecution must prove the absence of self-defense once raised. The first of the added sentences is intended to make that requirement clear. The second added sentence is

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intended to emphasize that even if the state succeeds in proving the absence of self-defense, the jury still must be satisfied by all the evidence that the defendant's conduct created an unreasonable risk of death or great bodily harm.

23. "Under circumstances which show utter disregard for human life" is the factor that distinguishes this offense from second degree reckless homicide. For a complete discussion of this factor, see Wis JI-Criminal 924A or note 4, Wis JI-Criminal 1020.

24. All the circumstances relating to the defendant's conduct should be considered in determining whether that conduct shows "utter disregard" for human life. See Wis JI-Criminal 924A and note 5, Wis JI-Criminal 1020.

25. The Committee has concluded that consideration of the privilege of self-defense is relevant to both the "unreasonable risk" and "utter disregard" components of first degree reckless homicide. Conduct does not show utter disregard for human life if it is undertaken on the reasonable exercise of the privilege of self-defense. Thus, the Committee concluded that it is best to advise the jury to consider the privilege of self-defense when considering the "utter disregard" element.

The last two sentences of this paragraph were added in 2014 in response to the decision in State v. Austin, see note 22, supra. Austin was concerned with the "unreasonable risk" element of the offense, but the same concern should apply to the "utter disregard" element of 1st degree reckless offenses. The first of the added sentences is intended to make it clear that the prosecution must prove the absence of self-defense once raised to meet its burden to prove "utter disregard for human life." The second added sentence is intended to emphasize that even if the state succeeds in proving the absence of self-defense, the jury still must be satisfied by all the evidence that circumstances of the defendant's conduct showed utter disregard for human life.

26. This material was added in 2011 in response to the decision of the Wisconsin Supreme Court in State v. Burris, 2011 WI 32, 333 Wis.2d 87, 797 N.W.2d 430. For a complete discussion of this issue, see Wis JI-Criminal 924A or note 6, Wis JI-Criminal 1020.

27. This paragraph builds in the part of the transitional material usually used between the charged crime and the lesser included offense. See Wis JI-Criminal 112A.

28. This statement is based on Wis JI-Criminal 112A which is recommended as an alternative style of submitting a lesser included offense. The Committee concluded it should be used here to emphasize the distinction between first and second degree reckless homicide.

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1018 FIRST DEGREE INTENTIONAL HOMICIDE; FIRST DEGREE RECKLESS HOMICIDE — § 940.01(1)(a); § 940.02(1)

Crimes To Consider

The defendant in this case is charged with first degree intentional homicide, and you must first consider whether the defendant is guilty of that offense. If you are not satisfied that the defendant is guilty of first degree intentional homicide, you must consider whether or not the defendant is guilty of first degree reckless homicide which is a less serious degree of criminal homicide.

Intentional and Reckless Homicide

The crimes referred to as first degree intentional and first degree reckless homicide are different types of homicide. Homicide is the taking of the life of another human being. The degree of homicide defined by the law depends on the facts and circumstances of each particular case.

Both intentional and reckless homicide require that the defendant caused the death of the victim. First degree intentional homicide requires the State to prove that the defendant acted with the intent to kill. First degree reckless homicide requires that the defendant acted recklessly, under circumstances which show utter disregard for human life. It is for you to decide of what type of homicide the defendant is guilty, if guilty at all, according to the instructions which define the two offenses.

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Statutory Definition of First Degree Intentional Homicide

First degree intentional homicide, as defined in § 940.01 of the Criminal Code of Wisconsin, is committed by one who causes the death of another human being with the intent to kill that person or another.

State's Burden of Proof

Before you may find the defendant guilty of first degree intentional homicide, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following two elements were present.

Elements of First Degree Intentional Homicide That the State Must Prove

1. The defendant caused the death of (name of victim).

   "Cause" means that the defendant's act was a substantial factor in producing the death.[1]

2. The defendant acted with the intent to kill ((name of victim)) (another human being).[2]

   "Intent to kill" means that the defendant had the mental purpose to take the life of another human being or was aware that (his) (her) conduct was practically certain to cause the death of another human being.[3]

When May Intent Exist?

While the law requires that the defendant acted with intent to kill, it does not require that the intent exist for any particular length of time before the act is committed. The act need

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not be brooded over, considered, or reflected upon for a week, a day, an hour, or even for a minute. There need not be any appreciable time between the formation of the intent and the act. The intent to kill may be formed at any time before the act, including the instant before the act, and must continue to exist at the time of the act.

Deciding About Intent

You cannot look into a person's mind to find intent. Intent to kill must be found, if found at all, from the defendant's acts, words, and statements, if any, and from all the facts and circumstances in this case bearing upon intent.[4]

Intent and Motive

Intent should not be confused with motive. While proof of intent is necessary to a conviction, proof of motive is not. "Motive" refers to a person's reason for doing something. While motive may be shown as a circumstance to aid in establishing the guilt of a defendant, the State is not required to prove motive on the part of a defendant in order to convict. Evidence of motive does not by itself establish guilt. You should give it the weight you believe it deserves under all of the circumstances.

Jury's Decision

If you are satisfied beyond a reasonable doubt that the defendant caused the death of (name of victim) with the intent to kill, you should find the defendant guilty of first degree intentional homicide.

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If you are not so satisfied, you must find the defendant not guilty of first degree intentional homicide, and you should consider whether the defendant is guilty of first degree reckless homicide in violation of section 940.02(1) of the Criminal Code of Wisconsin, which is a lesser included offense of first degree intentional homicide.

Make Every Reasonable Effort to Agree

You should make every reasonable effort to agree unanimously on the charge of first degree intentional homicide before considering the offense of first degree reckless homicide.[5] However, if after full and complete consideration of the evidence, you conclude that further deliberation would not result in unanimous agreement on the charge of first degree intentional homicide, you should consider whether the defendant is guilty of first degree reckless homicide.

Statutory Definition of First Degree Reckless Homicide

First degree reckless homicide, as defined in § 940.02(1) of the Criminal Code of Wisconsin, is committed by one who recklessly causes the death of another human being under circumstances that show utter disregard for human life.

State's Burden of Proof

Before you may find the defendant guilty of first degree reckless homicide, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following three elements were present.

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Elements of First Degree Reckless Homicide That the State Must Prove

1. The defendant caused the death of (name of victim).

   "Cause" means that the defendant's act was a substantial factor in producing the death.[6]

2. The defendant caused the death by criminally reckless conduct.

   "Criminally reckless conduct" means:[7]

   - the conduct created a risk of death or great bodily harm to another person; and
   - the risk of death or great bodily harm was unreasonable and substantial; and
   - the defendant was aware that (his) (her) conduct created the unreasonable and substantial risk of death or great bodily harm.[8]

3. The circumstances of the defendant's conduct showed utter disregard[9] for human life.

   In determining whether the circumstances of the conduct showed utter disregard for human life, consider these factors: what the defendant was doing; why the defendant was engaged in that conduct; how dangerous the conduct was; how obvious the danger was; whether the conduct showed any regard for life; and, all the other facts and circumstances relating to the conduct.[10]

ADD THE FOLLOWING IF EVIDENCE OF THE DEFENDANT'S AFTER-THE-FACT CONDUCT HAS BEEN ADMITTED.[11]

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[Consider also the defendant's conduct after the death to the extent that it helps you decide whether or not the circumstances showed utter disregard for human life at the time the death occurred.]

Jury's Decision

If you are satisfied beyond a reasonable doubt that the defendant caused the death of (name of victim) by criminally reckless conduct and that the circumstances of the conduct showed utter disregard for human life, you should find the defendant guilty of first degree reckless homicide.

If you are not so satisfied, you must find the defendant not guilty.

You are not, in any event, to find the defendant guilty of more than one offense.

COMMENT

Wis JI-Criminal 1018 was originally published in 1989 and revised in 2000 and 2010. This revision was approved the Committee in December 2011; it involved adding footnote 11 and the text accompanying it.

This instruction is for a case where first degree intentional homicide under § 940.01 is charged and second degree reckless homicide under § 940.02 is submitted as a lesser included offense. It applies to those statutes as amended by 1987 Wisconsin Act 399 as part of the revision of the homicide statutes. The revised statutes, and this instruction, apply to offenses committed on or after January 1, 1989.

This instruction combines the text of Wis JI-Criminal 1010, First Degree Intentional Homicide, and Wis JI-Criminal 1020, First Degree Reckless Homicide. See the comment to each of those instructions for discussion of substantive issues.

1. See note 2, Wis JI-Criminal 1010.

2. See note 3, Wis JI-Criminal 1010.

3. See note 4, Wis JI-Criminal 1010.

4. This is the shorter version used to describe the process of finding intent. The Committee has concluded that it is suitable for use in most cases. For the longer description of the intent-finding process, see Wis JI-Criminal 923A.

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5. This paragraph builds in some of the transitional material usually used between the charged crime and the lesser included offense. See Wis JI-Criminal 112.

6. See note 2, Wis JI-Criminal 1010.

7. "Criminal recklessness" is defined as follows in § 939.24(1):

> . . . 'criminal recklessness' means that the actor creates an unreasonable and substantial risk of death or great bodily harm to another human being and the actor is aware of that risk.

The Judicial Council Note to § 939.24, 1987 Senate Bill 191, explains that "[r]ecklessness requires both the creation of an objectively unreasonable and substantial risk of human death or great bodily harm and the actor's subjective awareness of that risk."

8. The statutory definition of "recklessness" clarifies that subjective awareness of the risk is required. However, voluntary intoxication that may prevent the actor from being aware of the risk is not a defense. See § 939.24(3) and note 3, Wis JI-Criminal 1020.

9. "Under circumstances which show utter disregard for human life" is the factor that distinguishes this offense from second degree reckless homicide. See Wis JI-Criminal 924A or note 4, Wis JI-Criminal 1020.

10. All the circumstances relating to the defendant's conduct should be considered in determining whether that conduct shows "utter disregard" for human life. See Wis JI-Criminal 924A or note 5, Wis JI-Criminal 1020.

11. This material was added in 2011 in response to the decision of the Wisconsin Supreme Court in State v. Burris, 2011 WI 32, 333 Wis.2d 87, 797 N.W.2d 430. For a complete discussion of this issue, see Wis JI-Criminal 924A or note 6, Wis JI-Criminal 1020.

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1020 FIRST DEGREE RECKLESS HOMICIDE — § 940.02(1)

Statutory Definition of the Crime

First degree reckless homicide, as defined in § 940.02(1) of the Criminal Code of Wisconsin, is committed by one who recklessly causes the death of another human being under circumstances that show utter disregard for human life.

State's Burden Of Proof

Before you may find the defendant guilty of first degree reckless homicide, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following three elements were present.

Elements of the Crime That the State Must Prove

1. The defendant caused the death of (name of victim).

   "Cause" means that the defendant's act was a substantial factor in producing the death.[1]

2. The defendant caused the death by criminally reckless conduct.

   "Criminally reckless conduct" means:[2]

   - the conduct created a risk of death or great bodily harm to another person; and
   - the risk of death or great bodily harm was unreasonable and substantial; and
   - the defendant was aware that (his) (her) conduct created the unreasonable and substantial risk of death or great bodily harm.[3]

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3. The circumstances of the defendant's conduct showed utter disregard[4] for human life.

In determining whether the circumstances of the conduct showed utter disregard for human life, consider these factors: what the defendant was doing; why the defendant was engaged in that conduct; how dangerous the conduct was; how obvious the danger was; whether the conduct showed any regard for life;[5] and, all other facts and circumstances relating to the conduct.

ADD THE FOLLOWING IF EVIDENCE OF THE DEFENDANT'S AFTER-THE-FACT CONDUCT HAS BEEN ADMITTED.[6]

[Consider also the defendant's conduct after the death to the extent that it helps you decide whether or not the circumstances showed utter disregard for human life at the time the death occurred.]

Jury's Decision

If you are satisfied beyond a reasonable doubt that the defendant caused the death of (name of victim) by criminally reckless conduct and that the circumstances of the conduct showed utter disregard for human life, you should find the defendant guilty of first degree reckless homicide.

If you are not so satisfied, you must find the defendant not guilty.

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COMMENT

Wis JI-Criminal 1020 was originally published in 1989 and revised in 2002 and 2012. The 2012 revision added the material at footnote 6. This revision was approved by the Committee in March 2015; it revised footnote 3 to reflect 2013 Wisconsin Act 307.

This instruction is for violations of § 940.02(1), created by 1987 Wisconsin Act 399 as part of the revision of the homicide statutes. The statute applies to offenses committed on or after January 1, 1989. For a brief overview of the homicide revision, see the Introductory Comment at Wis JI-Criminal 1000. A comprehensive outline and discussion of the changes can be found in "The Importance of Clarity in the Law of Homicide: The Wisconsin Revision," by Walter Dickey, David Schultz, and James L. Fullin, Jr., 1989 Wisconsin Law Review 1325.

This offense, first degree reckless homicide, replaces what was called second degree murder under prior law. The Judicial Council Note to § 940.02 describes the change and is found at note 4, below.

Subsection (2) of § 940.02 defines a crime also denominated "first degree reckless homicide" which applies to causing death by furnishing a controlled substance. See Wis JI-Criminal 1021.

For a case involving the lesser included offense of second degree reckless homicide, see Wis JI-Criminal 1022.

1. The Committee has concluded that the simple "substantial factor" definition of cause should be sufficient for most cases. Where there is evidence of more than one possible cause, something like the following might be added immediately preceding the sentence in the instruction beginning with "before":

> There may be more than one cause of death. The act of one person alone might produce it, or the acts of two or more persons might jointly produce it.

Also see, Wis JI-Criminal 901 Cause.

2. "Criminal recklessness" is defined as follows in § 939.24(1):

> . . . 'criminal recklessness' means that the actor creates an unreasonable and substantial risk of death or great bodily harm to another human being and the actor is aware of that risk.

The Judicial Council Note to § 939.24, 1987 Senate Bill 191, explains that "[r]ecklessness requires both the creation of an objectively unreasonable and substantial risk of human death or great bodily harm and the actor's subjective awareness of that risk."

3. The statutory definition of "recklessness" clarifies that subjective awareness of the risk is required. That raises the possibility that intoxication could, as a factual matter, negate awareness of the risk. For that reason, the original definition of recklessness provided that if voluntary intoxication prevented the actor from being aware of the risk, it was not a defense. This rule was set forth in § 939.24(3):

> (3) A voluntarily produced intoxicated or drugged condition is not a defense to liability for criminal recklessness if, had the actor not been in that condition, he or she would have been aware

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of creating an unreasonable and substantial risk of death or great bodily harm to another human being.

The Judicial Council Note to subsection (3) explains it as follows:

Subsection (3) continues the present rule that a voluntarily produced intoxicated or drugged condition is not a defense to liability for criminal recklessness. Ameen v. State, 51 Wis.2d 175, 185, 186 N.W.2d 206 (1971). Patterned on s. 2.08 of the model penal code, it premises liability on whether the actor would have been aware if not in such condition of the risk of death or great bodily harm. The commentaries to s. 2.08, model penal code, state the rationale of this rule in extended fashion.

Note to § 939.24(3), 1987 Senate Bill 191.

Section 939.42, the statute codifying both voluntary and involuntary intoxication defenses, was revised by 2013 Wisconsin Act 307 [effective date: April 18, 2014]. Reference to voluntary intoxication was eliminated; as amended, the statute refers only to involuntary intoxication. Act 307 also repealed former sub. (3) of § 939.24, thus getting rid of the special rule excluding voluntary intoxication as a defense to the "aware of the risk" element. For cases arising before the effective date of Act 307, the suggestion included in the previous version of this Comment would still apply: "In a case where there is evidence of intoxication, it may be helpful to advise the jury of the rule provided in subsection (3). The Committee concluded that simply reading the statute is the best way to provide the necessary information.

4. "Under circumstances which show utter disregard for human life" is the factor that distinguishes this offense from second degree reckless homicide. The Judicial Council Note to § 940.02 provides that it is intended to reflect the substance of case law defining "conduct evincing a depraved mind, regardless of human life":

First-degree reckless homicide is analogous to the prior offense of 2nd-degree murder. The concept of "conduct evincing a depraved mind, regardless of human life" has been a difficult one for modern juries to comprehend. To avoid the mistaken connotation that a clinical mental disorder is involved, the offense has been recodified as aggravated reckless homicide. The revision clarifies that a subjective mental state, i.e., criminal recklessness, is required for liability. See s. 939.24, stats. The aggravating element, i.e., circumstances which show utter disregard for human life, is intended to codify judicial interpretations of "conduct evincing a depraved mind, regardless of human life." State v. Dolan, 44 Wis.2d 68, 170 N.W.2d 822 (1969); State v. Weso, 60 Wis.2d 404, 210 N.W.2d 442 (1973).

Note to § 940.02, 1987 Senate Bill 191.

The Dolan and Weso cases do not contain significant definitions themselves but rather cite with approval Wis JI-Criminal 1345 (© 1962), which used the phrase "utter lack of concern for the life and safety of another."

The Committee concluded that no further definition of the phrase "utter disregard" was necessary. The jury should be able to give the phrase a common sense meaning in determining whether the conduct is such that it amounts to aggravated reckless homicide offense.

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A phrase with essentially the same meaning is used in the Model Penal Code. Section 2.02(1)(b) provides that criminal homicide constitutes murder when it is "committed recklessly under circumstances manifesting extreme indifference to the value of human life." The Commentary to § 2.02(1)(b) explains that whether conduct demonstrates "extreme indifference" "is not a question . . . that can be further clarified." Attempts to explain the term by reference to common law concepts, says the Commentary, suffer from lack of clarity, and "extreme indifference" is simpler and more direct than other attempts to reformulate the common law.

The Judicial Council Committee considered the Model Penal Code formulation but opted for "utter disregard," apparently on the grounds that it would more clearly tie in with prior case law which could be referred to for examples of the kind of conduct that is intended to be covered by first degree reckless homicide under the revised statutes.

For discussions of "conduct evincing a depraved mind, regardless of human life" under prior law, see, e.g., Balistreri v. State, 83 Wis.2d 440, 265 N.W.2d 290 (1978); Wagner v. State, 76 Wis.2d 30, 250 N.W.2d 331 (1977); and Seidler v. State, 64 Wis.2d 456, 219 N.W.2d 320 (1974). In State v. Geske, 2012 WI App 15, 339 Wis.2d 170, 810 N.W.2d 226, the defendant, convicted of first degree reckless homicide, challenged the sufficiency of the evidence on the "utter disregard" element. Relying on the Wagner and Balistreri cases, she argued that her swerve just before the collision showed some regard for human life. The court held that the evidence of the swerve had to be considered in the context of all the circumstances: "A legally intoxicated person driving over eighty miles per hour through the city could not reasonably expect to avoid any collision by swerving at the last moment. Given the totality of the situation here, Geske's ineffectual swerve failed to demonstrate a regard for human life." ¶18.

The meaning of "utter disregard for human life" was discussed in State v. Jensen, 2000 WI 84, 236 Wis.2d 521, 613 N.W.2d 170. The court relied on Weso, supra, to conclude that the phrase identifies an objective standard. The court noted:

> Although "utter disregard for human life" clearly has something to do with mental state, it is not a sub-part of the intent element of this crime, and, as such, need not be subjectively proven. It can be (and often is) proven by evidence relating to the defendant's subjective state of mind-by the defendant's statements, for example, before, during and after the crime. But it can also be established by evidence of heightened risk, because of special vulnerabilities of the victim, for example, or evidence of a particularly obvious, potentially lethal danger. However it is proven, the element of utter disregard for human life is measured objectively, on the basis of what a reasonable person in the defendant's position would have known. ¶17.

The Committee considered changing the instruction in response to Jensen, but concluded that the text accurately conveys a standard consistent with the decision. Jensen concluded that the standard could be understood and applied "without categorical rules being laid down by appellate courts on sufficiency of the evidence challenges." ¶29. The Committee concluded that the instruction could also be properly applied without attempting to articulate "categorical rules."

Also see, State v. Edmunds, 229 Wis.2d 67, 598 N.W.2d 290 (Ct. App. 1999), which, like Jensen, reviewed the application of the "utter disregard . . ." standard to a "shaken baby" case.

5. All the circumstances relating to the defendant's conduct should be considered in determining whether that conduct shows "utter disregard" for human life. These circumstances would include facts relating to the possible provocation of the defendant:

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Under prior law, adequate provocation mitigated 2nd-degree murder to manslaughter. State v. Hoyt, 21 Wis.2d 284, 124 N.W.2d 47 (1965). Under this revision, the analogs of those crimes, i.e., first-degree reckless and 2nd-degree intentional homicide, carry the same penalty; thus mitigation is impossible. Evidence of provocation will usually be admissible in prosecutions for crimes requiring criminal recklessness, however, as relevant to the reasonableness of the risk (and, in prosecutions under this section, whether the circumstances show utter disregard for human life). Since provocation is integrated into the calculus of recklessness, it is not an affirmative defense thereto and the burdens of production and persuasion stated in s. 940.01(3), stats., are inapplicable.

Judicial Council Note to § 940.02, 1987 Senate Bill 191.

6. This material was added in 2011 in response to the decision of the Wisconsin Supreme Court in State v. Burris, 2011 WI 32, 333 Wis.2d 87, 797 N.W.2d 430. The decision reversed a decision of the court of appeals which had reversed Burris' conviction for 1st degree reckless injury. The court of appeals reversed because the trial court's response to a jury question about whether after-the-incident conduct should be considered in evaluating whether "the circumstances show utter disregard for human life" was potentially misleading. The supreme court held:

¶7 We conclude that, in an utter disregard analysis, a defendant's conduct is not, as a matter of law, assigned more or less weight whether the conduct occurred before, during, or after the crime. We hold that, when evaluating whether a defendant acted with utter disregard for human life, a fact-finder should consider any relevant evidence in regard to the totality of the circumstances.

The court also held, that under the facts of the Burris case, "the supplemental instruction did not mislead the jury into believing that it could not consider Burris's relevant after-the-fact conduct in its determination on utter disregard for human life." ¶8.

The court recommended that the Committee address this issue in the jury instructions:

¶64 . . . [S]upplemental instructions such as the one given here, taken out of context from Jensen, do have the potential to be confusing. Thus, we recommend that the Criminal Jury Instruction Committee, in its comments to the "first-degree reckless" offense instructions, Wis JI-Criminal 1016-22, 1250, and the utter disregard for human life instruction, Wis JI-Criminal 924A, advise against taking certain language directly from utter disregard cases such as Jensen without providing the necessary context to fully explain the proper inquiry. Additionally, we recommend that the Committee consider revising these instructions to more explicitly direct the jury that, in its utter disregard for human life consideration, it should consider the totality of the circumstances including any relevant evidence regarding a defendant's conduct before, during, and after the crime.

The addition to the instruction referring to after-the-fact conduct is intended to address the court's suggestions. The committee decided it was not necessary to include a reference to conduct before or during the act because the paragraph immediately preceding the addition calls the jury's attention to "what the defendant was doing" and "all the other facts and circumstances relating to the conduct." Juries will rarely have questions about the relevance of conduct before and during the act but they may have questions about the after-fact-conduct, as the jury in the Burris case did.

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1020A FIRST DEGREE RECKLESS HOMICIDE OF AN UNBORN CHILD — § 940.02(1m)

Statutory Definition of the Crime

First degree reckless homicide, as defined in § 940.02(1m) of the Criminal Code of Wisconsin, is committed by one who recklessly causes the death of an unborn child under circumstances that show utter disregard for the life of [that unborn child] [(or) the woman who is pregnant with that unborn child] [(or) another].[1]

State's Burden Of Proof

Before you may find the defendant guilty of first degree reckless homicide, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following three elements were present.

Elements of the Crime That the State Must Prove

1. The defendant caused the death of an unborn child.

   "Cause" means that the defendant's act was a substantial factor in producing the death of the unborn child.[2]

   "Unborn child" means any individual of the human species from fertilization until birth that is gestating inside a woman.[3]

2. The defendant caused the death by criminally reckless conduct.

   "Criminally reckless conduct" means:[4]

   - the conduct created a risk of death or great bodily harm to [an unborn child] [(or) to the woman who is pregnant with the unborn child] [(or) to another]; and

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- the risk of death or great bodily harm was unreasonable and substantial; and
- the defendant was aware that (his) (her) conduct created the unreasonable and substantial risk of death or great bodily harm.[5]

3. The circumstances of the defendant's conduct showed utter disregard[6] [for the life of the unborn child] [(or) for the life of the woman who is pregnant with the unborn child] [(or) for the life of another].

In determining whether the circumstances of the conduct showed utter disregard for human life, consider these factors: what the defendant was doing; why the defendant was engaged in that conduct; how dangerous the conduct was; how obvious the danger was; whether the conduct showed any regard for life;[7] and, all other facts and circumstances relating to the conduct.

ADD THE FOLLOWING IF EVIDENCE OF THE DEFENDANT'S AFTER-THE-FACT CONDUCT HAS BEEN ADMITTED.[8]

[Consider also the defendant's conduct after the death to the extent that it helps you decide whether or not the circumstances showed utter disregard for human life at the time the death occurred.]

Jury's Decision

If you are satisfied beyond a reasonable doubt that the defendant caused the death of an unborn child by criminally reckless conduct and that the circumstances of the conduct showed utter disregard [for the life of the unborn child] [(or) for the life of the woman who

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is pregnant with the unborn child] [(or) for the life of another], you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.

COMMENT

Wis JI-Criminal 1020A was originally published in 1999 and revised in 2002 and 2012. The 2012 revision added footnote 8 and the text accompanying it. This revision was approved by the Committee in March 2013; it revised footnote 5 to reflect 2013 Wisconsin Act 307.

This instruction is drafted for the offense defined in § 940.02(1m), which was created by 1997 Wisconsin Act 295 [effective date: July 1, 1998]. The Act revised all the general homicide statutes to apply to causing the death of an unborn child; several non-homicide statutes were similarly revised.

Section 939.75, also created by Act 295, defines "unborn child" and sets forth several exceptions to the applicability of the revised statutes. Subsection (2)(b) recognizes the following exceptions:

- induced abortions [subd. 1.]
- acts committed in accordance with usual and customary standards of medical practice during diagnostic testing or therapeutic treatment by a licensed physician [sub. 2.]
- an act by a health care provider that is in accordance with a pregnant woman's power of attorney for health care, etc. [subd. 2h.]
- an act by a woman who is pregnant with an unborn child [subd. 3.]
- the lawful prescription, dispensation or administration, and the use by any a woman of, any medicine, drug or device that is used as a method of birth control or is intended to prevent pregnancy. [subd. 4]

Subsection (3) provides that if any of these exceptions are "placed in issue by the trial evidence, the state must prove beyond a reasonable doubt that the facts constituting the exception do not exist. . ." Thus, these exceptions are to be handled in the same manner as, for example, the mitigating circumstance of adequate provocation in cases of intentional homicide: once supported by some evidence, the absence of the exception becomes a fact the state must prove. The Committee decided not to draft instructions for the absence of these exceptions because it appeared to the Committee that their applicability would most likely be determined before charges were filed or at least before trial. Further, in cases involving reckless homicide, most of the exceptions might better be handled as relevant to the elements of the crime. That is, actions taken in accordance with customary standards of medical practice, for example, tend to show that the circumstances do not show utter disregard for life and that the conduct does not create an unreasonable risk of harm. However, § 939.75(3) is unequivocal on this point: "if an exception is raised by the evidence at trial, the state must prove beyond a reasonable doubt that the facts constituting the exception do not exist . . ."

1. The bracketed material sets forth the options provided in § 940.02(1m), which reads: ". . . under circumstances that show utter disregard for the life of that unborn child, the woman who is pregnant with that unborn child or another . . ." Only the alternatives supported by the evidence should be selected. If more than one alternative is submitted, the Committee has concluded that jury agreement on one alternative is not required as long as the jury is satisfied that the circumstances of the conduct showed "utter disregard. . ."

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2. The Committee has concluded that the simple "substantial factor" definition of cause should be sufficient for most cases. Where there is evidence of more than one possible cause, something like the following might be added immediately preceding the sentence in the instruction beginning with "before":

> There may be more than one cause of death. The act of one person alone might produce it, or the acts of two or more persons might jointly produce it.

Also see, Wis JI-Criminal 901 Cause.

3. This is the definition provided in § 939.75(1).

4. "Criminal recklessness" is defined as follows in § 939.24(1):

> . . . 'criminal recklessness' means that the actor creates an unreasonable and substantial risk of death or great bodily harm to another human being and the actor is aware of that risk.

The Judicial Council Note to § 939.24, 1987 Senate Bill 191, explains that "[r]ecklessness requires both the creation of an objectively unreasonable and substantial risk of human death or great bodily harm and the actor's subjective awareness of that risk."

5. The statutory definition of "recklessness" clarifies that subjective awareness of the risk is required. That raises the possibility that intoxication could, as a factual matter, negate awareness of the risk. For that reason, the original definition of recklessness provided that if voluntary intoxication prevented the actor from being aware of the risk, it was not a defense. This rule was set forth in § 939.24(3):

> (3) A voluntarily produced intoxicated or drugged condition is not a defense to liability for criminal recklessness if, had the actor not been in that condition, he or she would have been aware of creating an unreasonable and substantial risk of death or great bodily harm to another human being.

The Judicial Council Note to subsection (3) explains it as follows:

> Subsection (3) continues the present rule that a voluntarily produced intoxicated or drugged condition is not a defense to liability for criminal recklessness. Ameen v. State, 51 Wis.2d 175, 185, 186 N.W.2d 206 (1971). Patterned on s. 2.08 of the model penal code, it premises liability on whether the actor would have been aware if not in such condition of the risk of death or great bodily harm. The commentaries to s. 2.08, model penal code, state the rationale of this rule in extended fashion.

Note to § 939.24(3), 1987 Senate Bill 191.

Section 939.42, the statute codifying both voluntary and involuntary intoxication defenses, was revised by 2013 Wisconsin Act 307 [effective date: April 18, 2014]. Reference to voluntary intoxication was eliminated; as amended, the statute refers only to involuntary intoxication. Act 307 also repealed former sub. (3) of § 939.24, thus getting rid of the special rule excluding voluntary intoxication as a defense to the "aware of the risk" element. For cases arising before the effective date of Act 307, the suggestion included in the previous version of this Comment would still apply: "In a case where there is evidence of intoxication, it may be helpful to advise the jury of the rule provided in subsection (3). The Committee concluded that simply reading the statute is the best way to provide the necessary information.

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6. "Under circumstances which show utter disregard for human life" is the factor that distinguishes this offense from second degree reckless homicide. For a complete discussion of this factor, see Wis JI-Criminal 924A or note 4, Wis JI-Criminal 1020.

7. All the circumstances relating to the defendant's conduct should be considered in determining whether that conduct shows "utter disregard" for human life. See Wis JI-Criminal 924A or note 5, Wis JI-Criminal 1020.

8. This material was added in 2011 in response to the decision of the Wisconsin Supreme Court in State v. Burris, 2011 WI 32, 333 Wis.2d 87, 797 N.W.2d 430. For a complete discussion of this issue, see Wis JI-Criminal 924A or note 6, Wis JI-Criminal 1020.

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1021 FIRST DEGREE RECKLESS HOMICIDE — 940.02(2)[1]

Statutory Definition of the Crime

First degree reckless homicide, as defined in § 940.02(2) of the Criminal Code of Wisconsin, is committed by one who causes the death of another human being by delivery[2] of a controlled substance in violation of § 961.41 which another human being uses and dies as a result of that use.[3]

State's Burden of Proof

Before you may find the defendant guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following four elements[4] were present.

Elements of the Crime that the State Must Prove

1. The defendant delivered[5] a substance.

   "Deliver" means to transfer something from one person to another.[6]

2. The substance was (name controlled substance) .[7]

3. The defendant knew or believed that the substance was [(name controlled substance)] [a controlled substance. A controlled substance is a substance the delivery of which is prohibited by law.][8]

   You cannot look into a person's mind to determine knowledge or belief. You may determine knowledge or belief directly or indirectly from all the evidence concerning this offense. You may consider any statements or conduct of the

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defendant which indicate state of mind. You may find knowledge or belief from such conduct or statements, but you are not required to do so.

4. (Name of victim) used the substance alleged to have been delivered by the defendant and died as a result of that use.[9]

This requires that use of the controlled substance was a substantial factor in causing the death.[10]

IF DELIVERY BY MORE THAN ONE PERSON IS INVOLVED, ADD THE FOLLOWING:[11]

[It is not required that the defendant delivered the substance directly to (name of victim). If possession of the substance was transferred more than once before it was used by (name of victim), each person who transferred possession of that substance has delivered it.]

Jury's Decision

If you are satisfied beyond a reasonable doubt that the defendant delivered (name controlled substance), that the defendant knew that the substance was [(name controlled substance)] [a controlled substance],[12] that (name of victim) used (name controlled substance) delivered by the defendant, and that (name of victim) died as a result of that use, you should find the defendant guilty of first degree reckless homicide.

If you are not so satisfied, you must find the defendant not guilty.

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COMMENT

Wis JI-Criminal 1021 was originally published in 1989 and revised in 1992, 1998, 2006, and 2009. This revision was approved by the Committee in December 2010 and involved updating the comment and adding to footnote 9.

The 1997 revision addressed changes made by 1995 Wisconsin Act 448. [Effective date: July 9, 1996.] The primary changes were:

(1) renumbering the controlled substance statutes from Chapter 161 to Chapter 961;
(2) adding "distributing" to the conduct prohibited by § 940.02(2); and
(3) extending the coverage of the statute to "controlled substance analogs."

The instruction continues to refer only to "deliver" because that term seems to include "distribute" as well. "Distribute" is defined in § 961.01(9) as "to deliver other than by administering or dispensing. . . ." For offenses involving "manufacture," see Wis JI-Criminal 6021, and use the first and second elements of that instruction in place of the first element provided here. For offenses involving a "controlled substance analog," see Wis JI-Criminal 6005, which provides the definition of the term, and Wis JI-Criminal 6020A, which illustrates how an instruction must be modified to employ the "analog" alternative.

Possession of a controlled substance is not a lesser included offense of reckless homicide as defined in § 940.02(2)(a). State v. Clemons, 164 Wis.2d 506, 476 N.W.2d 283 (Ct. App. 1991). In Clemons, the court held that the strict statutory elements test for lesser included offenses was not satisfied: one can "deliver" without "possessing," as where a doctor provides drugs to a person by writing an illegitimate prescription. 164 Wis.2d 506, 512.

Charging a defendant with violating § 940.02(2) and with contributing to the delinquency of a child resulting in death under § 948.40(4)(a) is not multiplicitous. The offenses each require proof of a fact that the other does not and there is no evidence that the legislature did not intend multiple punishments. Further, a violation of § 948.40(4)(a) is not "a less serious type of criminal homicide" under § 939.66(2) and thus is not a lesser included offense of first degree reckless homicide. State v. Patterson, 2010 WI 130, 329 Wis.2d 599, 790 N.W.2d 909.

1. Section 940.02(2) defines a crime denominated "first degree reckless homicide" which applies to causing death by furnishing controlled substances. This offense was not part of the original homicide revision bill but was created by separate legislation referred to at the time as the "Len Bias Law." (See 1987 Wisconsin Act 339.) It was reenacted as part of the homicide revision.

2. This instruction is drafted for "delivery" of a controlled substance. For a case involving "manufacture," see Wis JI-Criminal 6021 and use the first and second elements of that instruction in place of the first element provided here. Also see the discussion of "distribute" above, in the comment preceding note 1.

3. This statement of the offense is essentially the same as the one found in § 940.02(2)(a). A different variation is found in subsection (2)(b) which applies where the defendant causes death by "administering or assisting in administering" a controlled substance.

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The balance of the instruction recasts the statutory statement of the offense by first establishing the requirements for a delivery in violation of § 961.41 and then adding the requirement that the victim die as a result of using the substance so delivered.

4. The first three elements are based on those required for delivery of a controlled substance under § 961.41(1). See Wis JI-Criminal 6020. The fourth element uses the language of § 940.02(2)(a).

5. See note 2, supra.

6. This definition was adopted from that found in § 961.01(6), which reads as follows:

"Deliver" or "delivery" means the actual, constructive or attempted transfer from one person to another of a controlled substance, whether or not there is any agency relationship.

The statute applies where the controlled substance is diluted after delivery and to each person who transfers the substance. Section 940.02(2)(a) provides that "[t]his paragraph applies:

. . . .

2. Whether or not the controlled substance or controlled substance analog is mixed or combined with any compound, mixture, diluent or other substance after the violation of s. 961.41 occurs.

3. To any distribution or delivery described in this paragraph, regardless of whether the distribution or delivery is made directly to the human being who dies. If possession of the controlled substance . . . is transferred more than once prior to the death as described in this paragraph, each person who distributes or delivers the controlled substance or controlled substance analog in violation of s. 961.41 is guilty under this paragraph."

7. Section 940.02(2) applies to controlled substances listed in Schedule I or II, which are listed in §§ 961.14 and 961.16, respectively. The statute also applies to delivery of "a controlled substance analog of a controlled substance included in Schedule I or II or of ketamine or flunitrazepam." See 940.02(2)(a). The instruction has been drafted to provide for the insertion of the specific name of the substance. The Committee has concluded that it adds clarity to use the name of the alleged substance throughout the instruction, although whether the defendant actually delivered the substance remains a question for the jury (see the first element).

8. For offenses under § 961.41, the defendant must know that the substance was a controlled substance. State v. Christel, 61 Wis.2d 143, 211 N.W.2d 801 (1973). Knowledge of the precise chemical name is not required. Lunde v. State, 85 Wis.2d 80, 270 N.W.2d 180 (1978).

While proof of knowledge is required for conviction, an information which charges the offense in the words of the statute (thereby omitting an allegation of knowledge) is sufficient to confer subject-matter jurisdiction, at least where there is no timely objection or showing of prejudice. State v. Nowakowski, 67 Wis.2d 545, 227 N.W.2d 497 (1975).

While the instruction suggests using the actual name of the substance for purposes of clarity, it is not necessary that the defendant know that name. Therefore, with respect to the third element, the name should be included only when there is no dispute about the defendant's knowledge or when the state is undertaking

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to prove that the defendant did know the identity of the substance. Otherwise, the more general alternative should be used: that the defendant knew the substance was a controlled substance.

It is no defense that the defendant delivered a controlled substance which he erroneously believed to be a different controlled substance at least where both substances are listed in the same schedule. State v. Smallwood, 97 Wis.2d 673, 294 N.W.2d 51 (1980).

A more complete note on the knowledge requirement is found at Wis JI-Criminal 6000.

It is sometimes a problem in controlled substance cases that the substance is known by its street name rather than by its proper scientific or chemical name. In such a case, Wis JI-Criminal 6020 recommends adding the following:

> This element does not require that the defendant knew the precise chemical or scientific name of the substance. If you are satisfied beyond a reasonable doubt that (street name) is a street name for (name controlled substance), and that the defendant knew or believed the substance he is alleged to have delivered was (street name), you may find that he knew or believed the substance was a controlled substance.

9. This element refers to "the substance alleged to have been delivered by the defendant" to avoid suggesting to the jury that the fact of delivery has been established. The Wisconsin Supreme Court has held that this approach would not be interpreted by members of the jury as lowering the burden of proof on the element of delivery. State v. Patterson, 2010 WI 130, ¶55, 329 Wis.2d 599, 790 N.W.2d 909. The court noted

> . . . that these instructions are not only sufficient, but necessary to ensure that the defendant is not prejudiced by the instruction. Any alternative to the phrase used in the jury instruction "alleged to have been delivered by the defendant" — such as referring to a "substance delivered by the defendant" — would have the effect of suggesting that the defendant is guilty of the first element before the jury has an opportunity to make that determination.
> 2010 WI 130, ¶55 [footnote 19].

It may be helpful to split this element into two separate elements — one dealing with the use of the substance and one dealing with death as a result — if the evidence indicates use of a substance that was mixed, diluted, or combined with another substance after delivery. Section 940.02(2)(a) provides that "[t]his paragraph applies:

> 1. Whether the human being dies as a result of using the controlled substance or controlled substance analog by itself or with any compound, mixture, diluent or other substance mixed or combined with the controlled substance or controlled substance analog.

10. The Committee has concluded that the simple "substantial factor" definition of cause should be sufficient for most cases. Where there is evidence of more than one possible cause, something like the following might be added:

> There may be more than one cause of death. The act of one person alone might produce it, or the acts of two or more persons might jointly produce it.

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See note 9, supra.

Section 940.02(2) states the causal requirement in two different ways. It requires that the defendant "cause the death of another human being" by, for example, manufacture of a controlled substance which a person uses "and dies as a result of that use." The statute is one of several criminal statutes using "results in" or "as a result" to establish the causal connection between the actor's conduct and the prohibited result. The Committee has concluded that "as a result" or "results in" should be interpreted to mean "cause," traditionally defined in terms of "substantial factor." This conclusion is supported by State v. Bartlett, 149 Wis.2d 557, 439 N.W.2d 595 (Ct. App. 1989), where the court construed "results in" as used in § 346.17(3).

The court held that the statute was not unconstitutionally vague because "results in" means "cause" and therefore defines the offense with reasonable certainty. The court further held that the evidence was sufficient to support the conviction because it showed that the defendant's conduct was a substantial factor in causing the death. The court noted that more than but-for cause is required: "The state must further establish that 'the harmful result in question be the natural and probable consequence of the accused's conduct,' i.e., a substantial factor." 149 Wis.2d 557, 566, citing State v. Serebin, 119 Wis.2d 837, 350 N.W.2d 65 (1984).

11. The paragraph in brackets is intended to explain the rule stated in § 940.02(2)(a):

    (a) This paragraph applies:

    . . .

    3. To any distribution or delivery described in this paragraph, regardless of whether the distribution or delivery is made directly to the human being who dies. If possession of the controlled substance . . . is transferred more than once prior to the death as described in this paragraph, each person who distributes or delivers the controlled substance or controlled substance analog in violation of s. 961.41 is guilty under this paragraph.

12. See note 8, supra.

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1022 FIRST DEGREE RECKLESS HOMICIDE: SECOND DEGREE RECKLESS HOMICIDE — § 940.02(1); § 940.06

Crimes To Consider

The defendant in this case is charged with first degree reckless homicide, and you must first consider whether the defendant is guilty of that offense. If you are not satisfied that the defendant is guilty of first degree reckless homicide, you must consider whether or not the defendant is guilty of second degree reckless homicide which is a less serious degree of criminal homicide.

Reckless Homicide

The crimes referred to as first and second degree reckless homicide are varying degrees of homicide. Homicide is the taking of the life of another human being. The degree of homicide defined by the law depends on the facts and circumstances of each particular case.

While the law separates reckless homicides into two degrees, there are certain elements which are common to each crime. Both first and second degree reckless homicide require that the defendant caused the death of the victim by criminally reckless conduct. First degree reckless homicide requires the State to prove the additional fact that the circumstances of the defendant's conduct showed utter disregard for human life. It is for you to decide of what degree of homicide the defendant is guilty, if guilty at all, according to the instructions which define the two degrees of reckless homicide.

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Statutory Definition of First Degree Reckless Homicide

First degree reckless homicide, as defined in § 940.02(1) of the Criminal Code of Wisconsin, is committed by one who recklessly causes the death of another human being under circumstances that show utter disregard for human life.

State's Burden of Proof

Before you may find the defendant guilty of first degree reckless homicide, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following three elements were present.

Elements of First Degree Reckless Homicide That the State Must Prove

1. The defendant caused the death of (name of victim).

   "Cause" means that the defendant's act was a substantial factor in producing the death.[1]

2. The defendant caused the death by criminally reckless conduct.

   "Criminally reckless conduct" means:[2]

   - the conduct created a risk of death or great bodily harm to another person; and
   - the risk of death or great bodily harm was unreasonable and substantial; and
   - the defendant was aware that (his) (her) conduct created the unreasonable and substantial risk of death or great bodily harm.[3]

3. The circumstances of the defendant's conduct showed utter disregard[4] for human life.

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In determining whether the circumstances of the conduct showed utter disregard for human life, consider these factors: what the defendant was doing; why the defendant was engaged in that conduct; how dangerous the conduct was; how obvious the danger was; whether the conduct showed any regard for life;[5] and, all other facts and circumstances relating to the conduct.

ADD THE FOLLOWING IF EVIDENCE OF THE DEFENDANT'S AFTER-THE-FACT CONDUCT HAS BEEN ADMITTED.[6]

[Consider also the defendant's conduct after the death to the extent that it helps you decide whether or not the circumstances showed utter disregard for human life at the time the death occurred.]

Jury's Decision

If you are satisfied beyond a reasonable doubt that the defendant caused the death of (name of victim) by criminally reckless conduct and that the circumstances of the conduct showed utter disregard for human life, you should find the defendant guilty of first degree reckless homicide.

If you are not so satisfied, you must not find the defendant guilty of first degree reckless homicide, and you should consider whether the defendant is guilty of second degree reckless homicide in violation of § 940.06 of the Criminal Code of Wisconsin, which is a lesser included offense of first degree reckless homicide.

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Make Every Reasonable Effort To Agree

You should make every reasonable effort to agree unanimously on the charge of first degree reckless homicide before considering the offense of second degree reckless homicide.[7] However, if after full and complete consideration of the evidence, you conclude that further deliberation would not result in unanimous agreement on the charge of first degree reckless homicide, you should consider whether the defendant is guilty of second degree reckless homicide.

Statutory Definition of Second Degree Reckless Homicide

Second degree reckless homicide, as defined in § 940.06 of the Criminal Code of Wisconsin, is committed by one who recklessly causes the death of another human being.

Difference Between First and Second Degree Reckless Homicide

The difference between first and second degree reckless homicide is that the first degree offense requires proof of one additional element: that the circumstances of the defendant's conduct showed utter disregard for human life.[8]

Jury's Decision

If you are satisfied beyond a reasonable doubt that all the elements of first degree reckless homicide were present, except the element requiring that the circumstances of the conduct showed utter disregard for human life, you should find the defendant guilty of second degree reckless homicide.

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In other words, if you are satisfied beyond a reasonable doubt that the defendant caused the death of (name of victim) by criminally reckless conduct, you should find the defendant guilty of second degree reckless homicide.

If you are not so satisfied, you must find the defendant not guilty.

You are not, in any event, to find the defendant guilty of more than one offense.

COMMENT

Wis JI-Criminal 1022 was originally published in 1989 and revised in 2002 and 2012. The 2012 revision added footnote 6 and the text accompanying it. This revision was approved by the Committee in March 2015; it revised footnote 3 to reflect 2013 Wisconsin Act 307.

This instruction is for a case where first degree reckless homicide under § 940.02(1) is charged and second degree reckless homicide under § 940.06 is submitted as a lesser included offense. It applies to those statutes as amended by 1987 Wisconsin Act 399 as part of the revision of the homicide statutes. The revised statutes apply to offenses committed on or after January 1, 1989. For a brief overview of the homicide revision, see the Introductory Comment at Wis JI-Criminal 1000. A comprehensive outline and discussion of the changes can be found in "The Importance of Clarity in the Law of Homicide: The Wisconsin Revision," by Walter Dickey, David Schultz, and James L. Fullin, Jr., 1989 Wisconsin Law Review 1325.

1. The Committee has concluded that the simple "substantial factor" definition of cause should be sufficient for most cases. Where there is evidence of more than one possible cause, something like the following might be added immediately preceding the sentence in the instruction beginning with "before":

> There may be more than one cause of death. The act of one person alone might produce it, or the acts of two or more persons might jointly produce it.

Also see, Wis JI-Criminal 901 Cause.

2. "Criminal recklessness" is defined as follows in § 939.24(1):

> . . . 'criminal recklessness' means that the actor creates an unreasonable and substantial risk of death or great bodily harm to another human being and the actor is aware of that risk.

The Judicial Council Note to § 939.24, 1987 Senate Bill 191, explains that "[r]ecklessness requires both the creation of an objectively unreasonable and substantial risk of human death or great bodily harm and the actor's subjective awareness of that risk."

3. The statutory definition of "recklessness" clarifies that subjective awareness of the risk is required. That raises the possibility that intoxication could, as a factual matter, negate awareness of the risk. For that

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reason, the original definition of recklessness provided that if voluntary intoxication prevented the actor from being aware of the risk, it was not a defense. This rule was set forth in § 939.24(3):

> (3) A voluntarily produced intoxicated or drugged condition is not a defense to liability for criminal recklessness if, had the actor not been in that condition, he or she would have been aware of creating an unreasonable and substantial risk of death or great bodily harm to another human being.
>
> The Judicial Council Note to subsection (3) explains it as follows:
>
> Subsection (3) continues the present rule that a voluntarily produced intoxicated or drugged condition is not a defense to liability for criminal recklessness. Ameen v. State, 51 Wis.2d 175, 185, 186 N.W.2d 206 (1971). Patterned on s. 2.08 of the model penal code, it premises liability on whether the actor would have been aware if not in such condition of the risk of death or great bodily harm. The commentaries to s. 2.08, model penal code, state the rationale of this rule in extended fashion.

Note to § 939.24(3), 1987 Senate Bill 191.

Section 939.42, the statute codifying both voluntary and involuntary intoxication defenses, was revised by 2013 Wisconsin Act 307 [effective date: April 18, 2014]. Reference to voluntary intoxication was eliminated; as amended, the statute refers only to involuntary intoxication. Act 307 also repealed former sub. (3) of § 939.24, thus getting rid of the special rule excluding voluntary intoxication as a defense to the "aware of the risk" element. For cases arising before the effective date of Act 307, the suggestion included in the previous version of this Comment would still apply: "In a case where there is evidence of intoxication, it may be helpful to advise the jury of the rule provided in subsection (3). The Committee concluded that simply reading the statute is the best way to provide the necessary information.

4. "Under circumstances which show utter disregard for human life" is the factor that distinguishes this offense from second degree reckless homicide. The Judicial Council Note to § 940.02 provides that it is intended to reflect the substance of case law defining "conduct evincing a depraved mind, regardless of human life":

> First-degree reckless homicide is analogous to the prior offense of 2nd-degree murder. The concept of "conduct evincing a depraved mind, regardless of human life" has been a difficult one for modern juries to comprehend. To avoid the mistaken connotation that a clinical mental disorder is involved, the offense has been recodified as aggravated reckless homicide. The revision clarifies that a subjective mental state, i.e., criminal recklessness, is required for liability. See s. 939.24, stats. The aggravating element, i.e., circumstances which show utter disregard for human life, is intended to codify judicial interpretations of "conduct evincing a depraved mind, regardless of human life." State v. Dolan, 44 Wis.2d 68, 170 N.W.2d 822 (1969); State v. Weso, 60 Wis.2d 404, 210 N.W.2d 442 (1973).
>
> Note to § 940.02, 1987 Senate Bill 191.

The Dolan and Weso cases do not contain significant definitions themselves but rather cite with approval Wis JI-Criminal 1345 (© 1962), which used the phrase "utter lack of concern for the life and safety of another."

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The Committee concluded that no further definition of the phrase "utter disregard" was necessary. The jury should be able to give the phrase a common sense meaning in determining whether the conduct is such that it amounts to aggravated reckless homicide offense.

A phrase with essentially the same meaning is used in the Model Penal Code. Section 2.02(1)(b) provides that criminal homicide constitutes murder when it is "committed recklessly under circumstances manifesting extreme indifference to the value of human life." The Commentary to § 2.02(1)(b) explains that whether conduct demonstrates "extreme indifference" "is not a question . . . that can be further clarified." Attempts to explain the term by reference to common law concepts, says the Commentary, suffer from lack of clarity, and "extreme indifference" is simpler and more direct than other attempts to reformulate the common law.

The Judicial Council Committee considered the Model Penal Code formulation but opted for "utter disregard," apparently on the grounds that it would more clearly tie in with prior case law which could be referred to for examples of the kind of conduct that is intended to be covered by first degree reckless homicide under the revised statutes.

For discussions of "conduct evincing a depraved mind, regardless of human life" under prior law, see, e.g., Balistreri v. State, 83 Wis.2d 440, 265 N.W.2d 290 (1978); Wagner v. State, 76 Wis.2d 30, 250 N.W.2d 331 (1977); and Seidler v. State, 64 Wis.2d 456, 219 N.W.2d 320 (1974). In State v. Geske, 2012 WI App 15, 339 Wis.2d 170, 810 N.W.2d 226, the defendant, convicted of first degree reckless homicide, challenged the sufficiency of the evidence on the "utter disregard" element. Relying on the Wagner and Balistreri cases, she argued that her swerve just before the collision showed some regard for human life. The court held that the evidence of the swerve had to be considered in the context of all the circumstances: "A legally intoxicated person driving over eighty miles per hour through the city could not reasonably expect to avoid any collision by swerving at the last moment. Given the totality of the situation here, Geske's ineffectual swerve failed to demonstrate a regard for human life." ¶18.

The meaning of "utter disregard for human life" was discussed in State v. Jensen, 2000 WI 84, 236 Wis.2d 521, 613 N.W.2d 170. The court relied on Weso, supra, to conclude that the phrase identifies an objective standard. The court noted:

> Although "utter disregard for human life" clearly has something to do with mental state, it is not a sub-part of the intent element of this crime, and, as such, need not be subjectively proven. It can be (and often is) proven by evidence relating to the defendant's subjective state of mind-by the defendant's statements, for example, before, during and after the crime. But it can also be established by evidence of heightened risk, because of special vulnerabilities of the victim, for example, or evidence of a particularly obvious, potentially lethal danger. However it is proven, the element of utter disregard for human life is measured objectively, on the basis of what a reasonable person in the defendant's position would have known. ¶17.

The Committee considered changing the instruction in response to Jensen, but concluded that the text accurately conveys a standard consistent with the decision. Jensen concluded that the standard could be understood and applied "without categorical rules being laid down by appellate courts on sufficiency of the evidence challenges." ¶29. The Committee concluded that the instruction could also be properly applied without attempting to articulate "categorical rules."

Also see, State v. Edmunds, 229 Wis.2d 67, 598 N.W.2d 290 (Ct. App. 1999), which, like Jensen, reviewed the application of the "utter disregard . . ." standard to a "shaken baby" case.

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5. All the circumstances relating to the defendant's conduct should be considered in determining whether that conduct shows "utter disregard" for human life. These circumstances would include facts relating to the possible provocation of the defendant:

> Under prior law, adequate provocation mitigated 2nd-degree murder to manslaughter. State v. Hoyt, 21 Wis.2d 284, 124 N.W.2d 47 (1965). Under this revision, the analogs of those crimes, i.e., first-degree reckless and 2nd-degree intentional homicide, carry the same penalty; thus mitigation is impossible. Evidence of provocation will usually be admissible in prosecutions for crimes requiring criminal recklessness, however, as relevant to the reasonableness of the risk (and, in prosecutions under this section, whether the circumstances show utter disregard for human life). Since provocation is integrated into the calculus of recklessness, it is not an affirmative defense thereto and the burdens of production and persuasion stated in s. 940.01(3), stats., are inapplicable.
>
> Judicial Council Note to § 940.02, 1987 Senate Bill 191.

6. This material was added in 2011 in response to the decision of the Wisconsin Supreme Court in State v. Burris, 2011 WI 32, 333 Wis.2d 87, 797 N.W.2d 430. The decision reversed a decision of the court of appeals which had reversed Burris' conviction for 1st degree reckless injury. The court of appeals reversed because the trial court's response to a jury question about whether after-the-incident conduct should be considered in evaluating whether "the circumstances show utter disregard for human life" was potentially misleading. The supreme court held:

> ¶7 We conclude that, in an utter disregard analysis, a defendant's conduct is not, as a matter of law, assigned more or less weight whether the conduct occurred before, during, or after the crime. We hold that, when evaluating whether a defendant acted with utter disregard for human life, a fact-finder should consider any relevant evidence in regard to the totality of the circumstances.

The court also held, that under the facts of the Burris case, "the supplemental instruction did not mislead the jury into believing that it could not consider Burris's relevant after-the-fact conduct in its determination on utter disregard for human life." ¶8.

The court recommended that the Committee address this issue in the jury instructions:

> ¶64 . . . [S]upplemental instructions such as the one given here, taken out of context from Jensen, do have the potential to be confusing. Thus, we recommend that the Criminal Jury Instruction Committee, in its comments to the "first-degree reckless" offense instructions, Wis JI-Criminal 1016-22, 1250, and the utter disregard for human life instruction, Wis JI-Criminal 924A, advise against taking certain language directly from utter disregard cases such as Jensen without providing the necessary context to fully explain the proper inquiry. Additionally, we recommend that the Committee consider revising these instructions to more explicitly direct the jury that, in its utter disregard for human life consideration, it should consider the totality of the circumstances including any relevant evidence regarding a defendant's conduct before, during, and after the crime.

The addition to the instruction referring to after-the-fact conduct is intended to address the court's suggestions. The committee decided it was not necessary to include a reference to conduct before or during the act because the paragraph immediately preceding the addition calls the jury's attention to "what the defendant was doing" and "all the other facts and circumstances relating to the conduct." Juries will rarely have questions about the relevance of conduct before and during the act but they may have questions about the after-fact-conduct, as the jury in the Burris case did.

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7. This paragraph builds in some of the transitional material usually used between the charged crime and the lesser included offense. See Wis JI-Criminal 112.

8. This statement is based on Wis JI-Criminal 112A which is recommended as an alternative style of submitting a lesser included offense. The Committee concluded it should be used here to emphasize the distinction between first and second degree reckless homicide.

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1023 FIRST DEGREE RECKLESS HOMICIDE: SECOND DEGREE RECKLESS HOMICIDE: NEGLIGENT HOMICIDE — § 940.02(1); § 940.06; § 940.08

Crimes to Consider

The defendant in this case is charged with first degree reckless homicide, and you must first consider whether the defendant is guilty of that offense. If you are not satisfied that the defendant is guilty of first degree reckless homicide, you must consider whether or not the defendant is guilty of second degree reckless homicide which is a less serious degree of criminal homicide. If you are not satisfied that the defendant is guilty of second degree reckless homicide, you must consider whether or not the defendant is guilty of homicide by negligent handling of a dangerous weapon which is also a less serious degree of criminal homicide.

The crimes referred to as first degree reckless homicide, second degree reckless homicide, and homicide by negligent handling of a dangerous weapon are varying degrees of homicide. Homicide is the taking of the life of another human being. The degree of homicide defined by the law depends on the facts and circumstances of each particular case.

Reckless Homicide

While the law separates reckless homicides into two degrees, there are certain elements which are common to each crime. Both first and second degree reckless homicide require that the defendant caused the death of the victim by criminally reckless conduct. First

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degree reckless homicide requires the State to prove the additional fact that the circumstances of the defendant's conduct showed utter disregard for human life.

Homicide by negligent handling of a dangerous weapon requires that the defendant caused the death of the victim by criminally negligent conduct in the operation or handling of a dangerous weapon.

It is for you to decide of what degree of homicide the defendant is guilty, if guilty at all, according to the instructions which define these offenses.

Statutory Definition of First Degree Reckless Homicide

First degree reckless homicide, as defined in § 940.02(1) of the Criminal Code of Wisconsin, is committed by one who recklessly causes the death of another human being under circumstances that show utter disregard for human life.

State's Burden of Proof

Before you may find the defendant guilty of first degree reckless homicide, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following three elements were present.

Elements of First Degree Reckless Homicide That the State Must Prove

1. The defendant caused the death of (name of victim).

   "Cause" means that the defendant's act was a substantial factor in producing the death.[1]

2. The defendant caused the death by criminally reckless conduct.

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"Criminally reckless conduct" means:[2]

- the conduct created a risk of death or great bodily harm to another person; and
- the risk of death or great bodily harm was unreasonable and substantial; and
- the defendant was aware that (his) (her) conduct created the unreasonable and substantial risk of death or great bodily harm.[3]

3. The circumstances of the defendant's conduct showed utter disregard[4] for human life.

In determining whether the circumstances of the conduct showed utter disregard for human life, consider these factors: what the defendant was doing; why the defendant was engaged in that conduct; how dangerous the conduct was; how obvious the danger was; whether the conduct showed any regard for life;[5] and, all other facts and circumstances relating to the conduct.

ADD THE FOLLOWING IF EVIDENCE OF THE DEFENDANT'S AFTER-THE-FACT CONDUCT HAS BEEN ADMITTED.[6]

[Consider also the defendant's conduct after the death to the extent that it helps you decide whether or not the circumstances showed utter disregard for human life at the time the death occurred.]

Jury's Decision

If you are satisfied beyond a reasonable doubt that the defendant caused the death of (name of victim) by criminally reckless conduct and that the circumstances of the conduct

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showed utter disregard for human life, you should find the defendant guilty of first degree reckless homicide.

If you are not so satisfied, you must not find the defendant guilty of first degree reckless homicide, and you should consider whether the defendant is guilty of second degree reckless homicide in violation of § 940.06 of the Criminal Code of Wisconsin, which is a lesser included offense of first degree reckless homicide.

Make Every Reasonable Effort To Agree

You should make every reasonable effort to agree unanimously on the charge of first degree reckless homicide before considering the offense of second degree reckless homicide.[7] However, if after full and complete consideration of the evidence, you conclude that further deliberation would not result in unanimous agreement on the charge of first degree reckless homicide, you should consider whether the defendant is guilty of second degree reckless homicide.

Statutory Definition of Second Degree Reckless Homicide

Second degree reckless homicide, as defined in § 940.06 of the Criminal Code of Wisconsin, is committed by one who recklessly causes the death of another human being.

Difference Between First and Second Degree Reckless Homicide

The difference between first and second degree reckless homicide is that the first degree offense requires proof of one additional element: that the circumstances of the defendant's conduct showed utter disregard for human life.[8]

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Jury's Decision

If you are satisfied beyond a reasonable doubt that all the elements of first degree reckless homicide were present, except the element requiring that the circumstances of the conduct showed utter disregard for human life, you should find the defendant guilty of second degree reckless homicide.

In other words, if you are satisfied beyond a reasonable doubt that the defendant caused the death of (name of victim) by criminally reckless conduct, you should find the defendant guilty of second degree reckless homicide.

If you are not so satisfied, you must not find the defendant guilty of second degree reckless homicide, and you should consider whether the defendant is guilty of homicide by negligent handling of a dangerous weapon in violation of § 940.08 of the Criminal Code of Wisconsin, which is a lesser included offense of first and second degree reckless homicide.

Make Every Reasonable Effort To Agree

You should make every reasonable effort to agree unanimously on the charge of second degree reckless homicide before considering the offense of homicide by negligent handling of a dangerous weapon.[9] However, if after full and complete consideration of the evidence, you conclude that further deliberation would not result in unanimous agreement on the charge of second degree reckless homicide, you should consider whether the defendant is guilty of homicide by negligent handling of a dangerous weapon.

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Statutory Definition of Homicide By Negligent Handling Of A Dangerous Weapon

Homicide by negligent handling of a dangerous weapon, as defined in § 940.08 of the Criminal Code of Wisconsin, is committed by one who causes the death of another human being by the negligent operation or handling of a dangerous weapon.

State's Burden of Proof

Before you may find the defendant guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following three elements were present.

Elements of the Crime That the State Must Prove

1. The defendant operated or handled a dangerous weapon.
2. The defendant operated or handled a dangerous weapon in a manner constituting criminal negligence.
3. The defendant's operation or handling of a dangerous weapon in a manner constituting criminal negligence caused the death of (name of victim).

   "Cause" means that the defendant's act was a substantial factor in producing the death.[10]

Meaning of "Dangerous Weapon"

"Dangerous weapon" means[11]

[any firearm, whether loaded or unloaded. A firearm is a weapon that acts by force of gunpowder.]

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[any device designed as a weapon and capable of producing death or great bodily harm. "Great bodily harm" means serious bodily injury.[12]]

[any device or instrumentality which, in the manner it is used or intended to be used, is likely to produce death or great bodily harm.[13] "Great bodily harm" means serious bodily injury.[14]]

[any electric weapon. An electric weapon is a device designed or used to immobilize or incapacitate a person by the use of electric current.]

Meaning of "Criminal Negligence"

"Criminal negligence" means:[15]

- the defendant's operation or handling of a dangerous weapon created a risk of death or great bodily harm; and
- the risk of death or great bodily harm was unreasonable and substantial; and
- the defendant should have been aware that (his) (her) operation or handling of a dangerous weapon created the unreasonable and substantial risk of death or great bodily harm.

IF REFERENCE TO ORDINARY NEGLIGENCE IS BELIEVED TO BE HELPFUL OR NECESSARY SEE WIS JI-CRIMINAL 925.[16]

The Difference Between Criminal Recklessness and Criminal Negligence

Criminal recklessness and criminal negligence both require conduct that creates an unreasonable and substantial risk of death or great bodily harm. Criminal recklessness requires that the person engaging in that conduct be aware of that risk, while criminal

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negligence requires that the person engaging in that conduct should have been aware of that risk.

Jury's Decision

If you are satisfied beyond a reasonable doubt that the defendant caused the death of (name of victim) by criminal negligence in the operation or handling of a dangerous weapon, you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.

You are not, in any event, to find the defendant guilty of more than one offense.

COMMENT

Wis JI-Criminal 1023 was approved by the Committee in October 2018.

This instruction is for a case where first degree reckless homicide under § 940.02(1) is charged and second degree reckless homicide under § 940.06 and homicide by negligent handling of a dangerous weapon under § 940.08 are submitted as lesser included offenses. Section 940.08 applies to criminal negligence in the operation or handling of "dangerous weapons, explosives or fire." The instruction is drafted for a case involving a "dangerous weapon" and would need to be modified if "fire" or "explosives" was involved. The material relating to negligent homicide is adapted from Wis JI-Criminal 1175.

A case illustrating the sequence of offenses addressed by this instruction is State v. Langlois, 2018 WI 73, 382 Wis.2d 414, 913 N.W.2d 812. The defendant challenged the instructions given in part on the grounds that it was error for the trial court to refer to "the risk" rather than referring to the full term – unreasonable and substantial risk – in referring to the elements of a lesser included offense. The Wisconsin Supreme Court concluded that using that "short cut" was not reversible error, but also noted:

> We recognize that the circuit court was reasonably concerned about the length of the instructions in this case. Although we conclude that the abbreviated jury instructions given in this case were not erroneous, it is best practice to read the pattern instructions for each charge, except, of course, where the pattern instructions themselves are abbreviated.
> 2018 WI 73, ¶42, footnote 23.

Langlois also involved a claim of self defense. The defendant alleged it was error for the trial court to fail to repeat that the burden was on the prosecution to prove beyond a reasonable doubt that the defendant was not privileged to act in self defense when addressing the lesser included offenses. Instead, the instructions stated "as I previously indicated," referring to the definition given when instructing on 1st degree reckless homicide which included a full description of the burden of proof. The court held that this

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was not error – the context made the reference clear. In the Committee's judgment, it is preferable to repeat the full statement of the burden of proof with each of the lesser included offenses. See Wis JI-Criminal 801 which provides an instruction for the privilege of self defense as applied to crimes involving criminal recklessness and criminal negligence.

This instruction applies to the statutes as amended by 1987 Wisconsin Act 399 as part of the revision of the homicide statutes. The revised statutes apply to offenses committed on or after January 1, 1989. For a brief overview of the homicide revision, see the Introductory Comment at Wis JI-Criminal 1000. A comprehensive outline and discussion of the changes can be found in "The Importance of Clarity in the Law of Homicide: The Wisconsin Revision," by Walter Dickey, David Schultz, and James L. Fullin, Jr., 1989 Wisconsin Law Review 1325.

1. The Committee has concluded that the simple "substantial factor" definition of cause should be sufficient for most cases. Where there is evidence of more than one possible cause, something like the following might be added:

> There may be more than one cause of death. The act of one person alone might produce it, or the acts of two or more persons might jointly produce it.

Also see, Wis JI-Criminal 901 Cause.

2. "Criminal recklessness" is defined as follows in § 939.24(1):

> . . . 'criminal recklessness' means that the actor creates an unreasonable and substantial risk of death or great bodily harm to another human being and the actor is aware of that risk.

The Judicial Council Note to § 939.24, 1987 Senate Bill 191, explains that "[r]ecklessness requires both the creation of an objectively unreasonable and substantial risk of human death or great bodily harm and the actor's subjective awareness of that risk."

3. The statutory definition of "recklessness" clarifies that subjective awareness of the risk is required. That raises the possibility that intoxication could, as a factual matter, negate awareness of the risk. For that reason, the original definition of recklessness provided that if voluntary intoxication prevented the actor from being aware of the risk, it was not a defense. This rule was set forth in § 939.24(3):

> (3) A voluntarily produced intoxicated or drugged condition is not a defense to liability for criminal recklessness if, had the actor not been in that condition, he or she would have been aware of creating an unreasonable and substantial risk of death or great bodily harm to another human being.

The Judicial Council Note to subsection (3) explains it as follows:

Subsection (3) continues the present rule that a voluntarily produced intoxicated or drugged condition is not a defense to liability for criminal recklessness. Ameen v. State, 51 Wis.2d 175, 185, 186 N.W.2d 206 (1971). Patterned on s. 2.08 of the model penal code, it premises liability on whether the actor would have been aware if not in such condition of the risk of death or great bodily harm. The commentaries to s. 2.08, model penal code, state the rationale of this rule in extended fashion.

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Note to § 939.24(3), 1987 Senate Bill 191.

Section 939.42, the statute codifying both voluntary and involuntary intoxication defenses, was revised by 2013 Wisconsin Act 307 [effective date: April 18, 2014]. Reference to voluntary intoxication was eliminated; as amended, the statute refers only to involuntary intoxication. Act 307 also repealed former sub. (3) of § 939.24, thus getting rid of the special rule excluding voluntary intoxication as a defense to the "aware of the risk" element. For cases arising before the effective date of Act 307, the suggestion included in the previous version of this Comment would still apply: "In a case where there is evidence of intoxication, it may be helpful to advise the jury of the rule provided in subsection (3). The Committee concluded that simply reading the statute is the best way to provide the necessary information."

4. "Under circumstances which show utter disregard for human life" is the factor that distinguishes this offense from second degree reckless homicide. The Judicial Council Note to § 940.02 provides that it is intended to reflect the substance of case law defining "conduct evincing a depraved mind, regardless of human life":

> First-degree reckless homicide is analogous to the prior offense of 2nd-degree murder. The concept of "conduct evincing a depraved mind, regardless of human life" has been a difficult one for modern juries to comprehend. To avoid the mistaken connotation that a clinical mental disorder is involved, the offense has been recodified as aggravated reckless homicide. The revision clarifies that a subjective mental state, i.e., criminal recklessness, is required for liability. See s. 939.24, stats. The aggravating element, i.e., circumstances which show utter disregard for human life, is intended to codify judicial interpretations of "conduct evincing a depraved mind, regardless of human life." State v. Dolan, 44 Wis.2d 68, 170 N.W.2d 822 (1969); State v. Weso, 60 Wis.2d 404, 210 N.W.2d 442 (1973).
>
> Note to § 940.02, 1987 Senate Bill 191.

The Dolan and Weso cases do not contain significant definitions themselves but rather cite with approval Wis JI-Criminal 1345 (© 1962), which used the phrase "utter lack of concern for the life and safety of another."

The Committee concluded that no further definition of the phrase "utter disregard" was necessary. The jury should be able to give the phrase a common sense meaning in determining whether the conduct is such that it amounts to aggravated reckless homicide offense.

A phrase with essentially the same meaning is used in the Model Penal Code. Section 2.02(1)(b) provides that criminal homicide constitutes murder when it is "committed recklessly under circumstances manifesting extreme indifference to the value of human life." The Commentary to § 2.02(1)(b) explains that whether conduct demonstrates "extreme indifference" "is not a question . . . that can be further clarified." Attempts to explain the term by reference to common law concepts, says the Commentary, suffer from lack of clarity, and "extreme indifference" is simpler and more direct than other attempts to reformulate the common law.

The Judicial Council Committee considered the Model Penal Code formulation but opted for "utter disregard," apparently on the grounds that it would more clearly tie in with prior case law which could be

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referred to for examples of the kind of conduct that is intended to be covered by first degree reckless homicide under the revised statutes.

For discussions of "conduct evincing a depraved mind, regardless of human life" under prior law, see, e.g., Balistreri v. State, 83 Wis.2d 440, 265 N.W.2d 290 (1978); Wagner v. State, 76 Wis.2d 30, 250 N.W.2d 331 (1977); and Seidler v. State, 64 Wis.2d 456, 219 N.W.2d 320 (1974). In State v. Geske, 2012 WI App 15, 339 Wis.2d 170, 810 N.W.2d 226, the defendant, convicted of first degree reckless homicide, challenged the sufficiency of the evidence on the "utter disregard" element. Relying on the Wagner and Balistreri cases, she argued that her swerve just before the collision showed some regard for human life. The court held that the evidence of the swerve had to be considered in the context of all the circumstances: "A legally intoxicated person driving over eighty miles per hour through the city could not reasonably expect to avoid any collision by swerving at the last moment. Given the totality of the situation here, Geske's ineffectual swerve failed to demonstrate a regard for human life." ¶18.

The meaning of "utter disregard for human life" was discussed in State v. Jensen, 2000 WI 84, 236 Wis.2d 521, 613 N.W.2d 170. The court relied on Weso, supra, to conclude that the phrase identifies an objective standard. The court noted:

> Although "utter disregard for human life" clearly has something to do with mental state, it is not a sub-part of the intent element of this crime, and, as such, need not be subjectively proven. It can be (and often is) proven by evidence relating to the defendant's subjective state of mind-by the defendant's statements, for example, before, during and after the crime. But it can also be established by evidence of heightened risk, because of special vulnerabilities of the victim, for example, or evidence of a particularly obvious, potentially lethal danger. However it is proven, the element of utter disregard for human life is measured objectively, on the basis of what a reasonable person in the defendant's position would have known. ¶17.

The Committee considered changing the instruction in response to Jensen, but concluded that the text accurately conveys a standard consistent with the decision. Jensen concluded that the standard could be understood and applied "without categorical rules being laid down by appellate courts on sufficiency of the evidence challenges." ¶29. The Committee concluded that the instruction could also be properly applied without attempting to articulate "categorical rules."

Also see, State v. Edmunds, 229 Wis.2d 67, 598 N.W.2d 290 (Ct. App. 1999), which, like Jensen, reviewed the application of the "utter disregard . . ." standard to a "shaken baby" case.

5. All the circumstances relating to the defendant's conduct should be considered in determining whether that conduct shows "utter disregard" for human life. These circumstances would include facts relating to the possible provocation of the defendant:

> Under prior law, adequate provocation mitigated 2nd-degree murder to manslaughter. State v. Hoyt, 21 Wis.2d 284, 124 N.W.2d 47 (1965). Under this revision, the analogs of those crimes, i.e., first-degree reckless and 2nd-degree intentional homicide, carry the same penalty; thus mitigation is impossible. Evidence of provocation will usually be admissible in prosecutions for crimes requiring criminal recklessness, however, as relevant to the reasonableness of the risk (and, in prosecutions under this section, whether the circumstances show utter disregard for human life). Since provocation is integrated into the calculus of

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recklessness, it is not an affirmative defense thereto and the burdens of production and persuasion stated in s. 940.01(3), stats., are inapplicable.
Judicial Council Note to § 940.02, 1987 Senate Bill 191.

6. This material was added in 2011 in response to the decision of the Wisconsin Supreme Court in State v. Burris, 2011 WI 32, 333 Wis.2d 87, 797 N.W.2d 430. The decision reversed a decision of the court of appeals which had reversed Burris' conviction for 1st degree reckless injury. The court of appeals reversed because the trial court's response to a jury question about whether after-the-incident conduct should be considered in evaluating whether "the circumstances show utter disregard for human life" was potentially misleading. The supreme court held:

> ¶7 We conclude that, in an utter disregard analysis, a defendant's conduct is not, as a matter of law, assigned more or less weight whether the conduct occurred before, during, or after the crime. We hold that, when evaluating whether a defendant acted with utter disregard for human life, a fact-finder should consider any relevant evidence in regard to the totality of the circumstances.

The court also held, that under the facts of the Burris case, "the supplemental instruction did not mislead the jury into believing that it could not consider Burris's relevant after-the-fact conduct in its determination on utter disregard for human life." ¶8.

The court recommended that the Committee address this issue in the jury instructions:

> ¶64 . . . [S]upplemental instructions such as the one given here, taken out of context from Jensen, do have the potential to be confusing. Thus, we recommend that the Criminal Jury Instruction Committee, in its comments to the "first-degree reckless" offense instructions, Wis JI-Criminal 1016-22, 1250, and the utter disregard for human life instruction, Wis JI-Criminal 924A, advise against taking certain language directly from utter disregard cases such as Jensen without providing the necessary context to fully explain the proper inquiry. Additionally, we recommend that the Committee consider revising these instructions to more explicitly direct the jury that, in its utter disregard for human life consideration, it should consider the totality of the circumstances including any relevant evidence regarding a defendant's conduct before, during, and after the crime.

The addition to the instruction referring to after-the-fact conduct is intended to address the court's suggestions. The Committee decided it was not necessary to include a reference to conduct before or during the act because the paragraph immediately preceding the addition calls the jury's attention to "what the defendant was doing" and "all the other facts and circumstances relating to the conduct." Juries will rarely have questions about the relevance of conduct before and during the act but they may have questions about the after-fact-conduct, as the jury in the Burris case did.

7. This paragraph builds in some of the transitional material usually used between the charged crime and the lesser included offense. See Wis JI-Criminal 112.

8. This statement is based on Wis JI-Criminal 112A which is recommended as an alternative style of submitting a lesser included offense. The Committee concluded it should be used here to emphasize the distinction between first and second degree reckless homicide.

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9. This paragraph builds in some of the transitional material usually used between the charged crime and the lesser included offense. See Wis JI-Criminal 112.

10. The Committee has concluded that the simple "substantial factor" definition of cause should be sufficient for most cases. Where there is evidence of more than one possible cause, something like the following might be added:

> There may be more than one cause of death. The act of one person alone might produce it, or the acts of two or more persons might jointly produce it.

Also see, Wis JI-Criminal 901 Cause.

11. Choose the alternative supported by the evidence. They are based on the definition of "dangerous weapon" provided in § 939.22(10). See Wis JI-Criminal 910 for footnotes discussing each alternative.

12. The Committee has concluded that defining great bodily harm as "serious bodily injury" is sufficient in most cases. See Wis JI-Criminal 914 for a complete discussion of that term, as defined in § 939.22(14).

13. A potential problem in instructing on this part of the definition of dangerous weapon is illustrated by State v. Tomlinson, 2002 WI 91, 254 Wis.2d 502, 648 N.W.2d 367. Tomlinson was charged with being party to the crime of first degree reckless homicide while using a dangerous weapon. In instructing on the dangerous weapon penalty enhancer the court stated: "'Dangerous weapon' means a baseball bat." The supreme court held that the instruction was error, concluding that it created a "mandatory conclusive presumption because it requires the jury to find that Tomlinson used a 'dangerous weapon' . . . if it first finds . . . that he used a baseball bat." 2002 WI 91, ¶62.

In light of Tomlinson, the Committee concluded that the definition of "dangerous weapon" in the instructions should be revised to include all the statutory alternatives in the text of the instruction. The alternative to be used in a case like Tomlinson would be the following:

> "Dangerous weapon" means any device or instrumentality which, in the manner it is used or intended to be used, is likely to produce death or great bodily harm. "Great bodily harm" means serious bodily injury.

If instructing the jury in terms tailored to the facts of the case is believed to be desirable, a different approach for a baseball bat case might be as follows:

> The state alleges that a baseball bat was a dangerous weapon. A baseball bat may be considered to be a dangerous weapon if, in the manner it was used, it was calculated or likely to produce death or great bodily harm.

14. The Committee has concluded that defining great bodily harm as "serious bodily injury" is sufficient in most cases. See Wis JI-Criminal 914 for a complete discussion of that term, as defined in § 939.22(14).

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15. The definition of "criminal negligence" is based on the one provided in § 939.25. The Committee concluded that this definition, which highlights the three significant components of the statutory definition, is preferable to the one formerly used, which began by defining "ordinary negligence." See Wis JI-Criminal 925 for a complete discussion of the Committee's rationale for adopting this definition and for optional material that may be added if believed to be necessary.

16. Wis JI-Criminal 925 includes two additional paragraphs: one describing "ordinary negligence" and one explaining how "criminal negligence" differs.

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1030 FELONY MURDER: UNDERLYING CRIME COMPLETED — § 940.03

Statutory Definition of the Crime

Felony murder, as defined in § 940.03 of the Criminal Code of Wisconsin, is committed by one who causes the death of another human being while committing the crime of (name of crime).[1]

State's Burden of Proof

Before you may find the defendant guilty of felony murder, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following elements were present.

Elements of Felony Murder That the State Must Prove

1. The defendant committed the crime of (name of crime).
2. The death of (name of victim) was caused by the commission of the (name of crime).[2]

Determining Whether the Defendant Committed (name of crime)

The first element of felony murder requires that the defendant committed the crime of (name of crime).

(Name of crime), as defined in section _____[3] of the Criminal Code of Wisconsin, is committed by one who (here refer to the instruction for the underlying crime to fully define the elements of that crime).[4]

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Determining Whether Death was Caused by the Commission of (name of crime)

The second element of felony murder requires that the death of (name of victim) was caused by the commission of the (name of crime).

The Meaning of "Cause"

"Cause" means that the commission of the (name of crime) was a substantial factor in producing the death.[5]

ADD THE FOLLOWING IN CASES INVOLVING THE IMMEDIATE FLIGHT FROM A CRIME.[6]

[The phrase "the commission of" the crime includes the period of immediate flight from that crime.]

Jury's Decision on Felony Murder

If you are satisfied beyond a reasonable doubt that the defendant committed the crime of (name of crime) and that the death of (name of victim) was caused by the commission of the (name of crime), you should find the defendant guilty of felony murder.

If you are not so satisfied, you must find the defendant not guilty.

COMMENT

Wis JI-Criminal 1030 was originally published in 1989 and revised in 1994, 1998, 2003, and 2007. The 2007 revision reflected the addition of several felonies to the list of those that can provide the predicate for a felony murder charge. This revision was approved by the Committee in December 2012; it updated the Comment.

This instruction is for a felony murder case based on the complete commission of the underlying crime. For cases involving an attempt to commit the underlying crime, see Wis JI-Criminal 1031. For cases based on committing the crime as a party to the crime, see Wis JI-Criminal 1032.

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2005 Wisconsin Act 313 amended §940.03, Felony murder, to add the following offenses as predicate offenses:

- § 940.19 Battery
- § 940.195 Battery to an unborn child
- § 940.20 Battery: special circumstances
- § 940.201 Battery or threat to witness
- § 940.203 Battery or threat to judge
- § 940.30 False imprisonment
- § 940.31 Kidnapping

The complete list of predicate offenses is provided in footnote 1. The list of uniform criminal jury instructions for the predicate offenses is provided in footnote 4.

Note that the offenses added by Act 313 include two offenses that define misdemeanor offenses: § 940.19(1) and § 940.195(1). It is not clear whether the application of the revised felony murder statute was intended to be based on the commission of a misdemeanor. Wisconsin had misdemeanor manslaughter statutes until the Criminal Code was revised in 1955. See, for example, § 340.10, 1953 Wis. Stats.

The penalty for violating § 940.03, as amended by 2001 Wisconsin Act 109, is imprisonment for not more than 15 years in excess of the maximum term of imprisonment for the underlying crime. This was a change from 20 years under prior law. Adding 15 years to the total term of imprisonment yields a new "unclassified felony" under § 973.01(2)(b)10. 75% of the term is the maximum period of confinement; 25% of the term is the extended supervision maximum. State v. Mason, 2004 WI App 176, 276 Wis.2d 434, 687 N.W.2d 526.

This instruction is for a violation of § 940.03, created by 1987 Wisconsin Act 399 as part of the revision of the homicide statutes. The statute applies to offenses committed on or after January 1, 1989. For a discussion of the homicide revision generally, and of the offense covered by this instruction, see "The Importance of Clarity in the Law of Homicide: The Wisconsin Revision," by Walter Dickey, David Schultz, and James L. Fullin, Jr., 1989 Wisconsin Law Review 1325.

The underlying felony is a lesser included offense of felony murder. State v. Carlson, 5 Wis.2d 595, 608, 93 N.W.2d 355 (1958); State v. Gordon, 111 Wis.2d 133, 330 N.W.2d 564 (1983). Thus, the felony could be submitted to the jury as a lesser included offense if the evidentiary standard is met; it should not be charged as separate count. Carlson dealt with § 940.03 of the statutes in effect in 1957, defining "third degree murder." The current statute is essentially the same as the statute in Carlson, except it is limited to designated felonies. Carlson held that "the correct procedure" would be:

> in the first instance to bring but a single charge of third-degree murder and for the court to submit to the jury verdicts of third-degree murder, arson, and not guilty. The arson could properly be submitted to the jury because it is an included crime within the meaning of sec. 939.66(1) of the Criminal Code. But the jury should be instructed to sign but one verdict, so that if they found the defendant guilty of third-degree murder they would make no finding with respect to the separate form of verdict of arson. On the other hand if they found the defendant not guilty of third-degree murder they might still find him guilty of arson, if they found that he set the fire but that it did not cause the death.
> 5 Wis.2d 595, 608-09.

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The felony murder statute applies to a situation where a co-felon is killed by the intended victim of the felony. State v. Oimen, 184 Wis.2d 423, 516 N.W.2d 399 (1994). It also applies when a person present at the crime is killed by the intended victim of the felony. State v. Rivera, 184 Wis.2d 485, 516 N.W.2d 391 (1994). In both cases, the court held that the plain language of the statute applies: the defendants caused the death while committing the felony. The so-called agency approach that limits liability in similar situations in some jurisdictions was rejected.

In Oimen, the court also addressed the proper way to integrate party to the crime with felony murder: ". . . [W]e wish to point out that [Oimen] should not have been charged as a party to the crime of felony murder. Oimen was appropriately charged as a party to the underlying offense, attempted armed robbery. Charging felony murder as a party to the crime is redundant and unnecessary. A person convicted of a felony as a party to the crime becomes a principal to a murder occurring as a result of that felony." 184 Wis.2d 423, 449. The court of appeals affirmed a conviction for felony murder, party to the crime, in a case decided shortly before Oimen. See State v. Chambers, 183 Wis.2d 316, 515 N.W.2d 531 (Ct. App. 1994). See Wis JI-Criminal 1032 and 1032 EXAMPLE for uniform instructions combining felony murder and party to the crime.

In State v. Briggs, 218 Wis.2d 61, 579 N.W.2d 783 (Ct. App., 1998), the court held that there is no crime of "attempted felony murder," meaning that the defendant must be allowed to withdraw his negotiated plea of no contest to that offense. Briggs and his accomplice were interrupted by the victim as they were stealing her car and ordered her back into the house at gun point. They forced her to the floor, placed a pillow over her head, and Briggs's companion shot her in the head, causing her very serious, permanent injuries. Briggs was charged as party to the crimes of attempted first-degree intentional homicide, armed car theft, armed robbery, armed burglary, and criminal damage to property. He reached an agreement with the state to plead no contest to both counts of an amended information charging him with attempted felony murder and armed burglary, both as a party to crime. He later moved to vacate his conviction, contending that the circuit court lacked subject-matter jurisdiction because the crime of attempted felony murder does not exist. The court of appeals agreed, relying in part on State v. Carter, 44 Wis.2d 151, 155, 170 N.W.2d 681, 683 (1969), which had concluded that felony murder does not require intent, and therefore, "is not reconcilable with the concept of attempt."

1. As amended by 2005 Wisconsin Act 313, § 940.03 specifies thirteen statutes defining crimes that can be the basis for a felony murder charge. The thirteen crimes are:

- § 940.19 Battery
- § 940.195 Battery to an unborn child
- § 940.20 Battery: special circumstances
- § 940.201 Battery or threat to witness
- § 940.203 Battery or threat to judge
- § 940.225(1) First Degree Sexual Assault
- § 940.225(2)(a) Second Degree Sexual Assault
- § 940.30 False imprisonment
- § 940.31 Kidnapping
- § 943.02 Arson
- § 943.10(2) Aggravated Burglary
- § 943.23(1g) "Carjacking"
- § 943.32(2) Armed Robbery

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As to violations of § 940.225(1), note that sexual contact or sexual intercourse under three different circumstances could be involved:

(a) without consent and causing pregnancy or great bodily harm
(b) without consent by use or threat of a dangerous weapon or article
(c) without consent, while aided and abetted and by use or threat of force.

2. "While committing or attempting to commit" is the phrase used by § 940.03 to identify the connection between the underlying felony and the death. In applying the statutory phrase in the instruction, the Committee adopted the following rationale: the defendant causes the death if he or she was concerned in the commission of the felony and the commission of the felony caused the death. This is consistent with the rationale in the Oimen and Rivera cases, see the comment preceding note 1, and was approved as a correct statement of the law in State v. Krawczyk, 2003 WI App 6, ¶23, 259 Wis.2d 843, 657 N.W.2d 77.

The version of the Wisconsin felony murder statute that preceded current § 940.03 required that the death be caused "as a natural and probable consequence of the commission of or attempt to commit a felony." The nature of the connection between the felony and the death has been a source of considerable difficulty in many states which have felony murder statutes. See the Introductory Comment at Wis JI-Criminal 1000 and LaFave and Scott, Substantive Criminal Law, Vol. 2, pages 222-28 (West 1986).

Some of the difficulty in defining the connection between the causing of death and the commission of the felony has been the result of the wide range of felonies to which the felony murder rule could apply. Wisconsin's statute as revised in 1989 addressed that problem by specifying a limited number of felonies — 5 — that could be predicates for felony murder. One felony was added by 2001 Wisconsin Act 109 — s. 943.23(1g). Seven more crimes were added by 2005 Wisconsin Act 313. Thus, at least with the original limited list of predicate felonies, it could be argued that it is appropriate to extend liability for deaths caused by those felonies, even to those deaths that are more remote.

The other issue that may come up with respect to the cause issue involves relating the time of the death to the time the felony was committed. Since § 940.03 specifically includes attempts to commit the named felonies, the primary questions are likely to arise with respect to deaths caused after the felony is technically complete. For example, does the statute apply to deaths caused by the felon while fleeing the scene of the crime? Statutes in some states include deaths caused "while fleeing immediately after committing" a felony (§ 2903.01, Ohio Rev. Codes) or those caused in the "immediate flight after committing" the felony (17-A § 202, Me. Rev. Stats.). Wisconsin has reached the same result by case law. See note 6, below.

The Committee concluded that questions about the connection between the felony and deaths caused after the felony is committed are best resolved by asking: Did the commission of the felony cause the death? As stated in the LaFave treatise: ". . . If this causal connection does exist, the killing may take place at some time before or after . . . whether there was sufficient causal connection between the felony and the homicide depends on whether the defendant's felony dictated his conduct which led to the homicide." LaFave and Scott, Substantive Criminal Law, Vol. 2, pages 222 and 227 (West 1986).

3. Here include the statute violated, for example: "The crime of first degree sexual assault, as defined in § 940.225(1)(a) of the Criminal Code of Wisconsin. . ." This is the way the first sentence of the uniform instruction for the underlying felony will read.

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4. The uniform jury instructions for the potential underlying felonies are as follows:

- for § 940.19 Battery – Wis JI-Criminal 1220-1226
- for § 940.195 Battery to an unborn child – Wis JI-Criminal 1227
- for § 940.20 Battery: special circumstances – Wis JI-Criminal 1228-1237
- for § 940.201 Battery or threat to witness – Wis JI-Criminal 1238
- for § 940.203 Battery or threat to judge – Wis JI-Criminal 1248
- for § 940.225(1) First Degree Sexual Assault – Wis JI-Criminal 1200-1207
- for § 940.225(2)(a) Second Degree Sexual Assault – Wis JI-Criminal 1208, 1209
- for § 940.30 False imprisonment – Wis JI-Criminal 1275
- for § 940.31 Kidnapping – Wis JI-Criminal 1280-1282
- for § 943.02 Arson – Wis JI-Criminal 1404, 1405
- for § 943.10(2) Armed Burglary – Wis JI-Criminal 1422
- for § 943.23(1g) "Carjacking" – Wis JI-Criminal 1463
- for § 943.32(2) Armed Robbery – Wis JI-Criminal 1480, 1480A

If an attempt to commit one of these felonies is the basis for the charge, Wis JI-Criminal 1031 provides a model.

5. The Committee concluded that the simple "substantial factor" definition of cause should be sufficient for most cases. Where there is evidence of more than one possible cause, something like the following might be added immediately preceding the sentence in the instruction beginning with "before":

> There may be more than one cause of death. The act of one person alone might produce it, or the acts of two or more persons might jointly produce it.

Also see Wis JI-Criminal 901, Cause.

6. In State v. Oimen, 184 Wis.2d 423, 428, 516 N.W.2d 399 (1994), the Wisconsin Supreme Court concluded "as a matter of law that the phrase in § 940.03, 'while committing or attempting to commit', encompasses the immediate flight from a felony." The court further directed that in the future, courts should utilize an instruction that includes the quoted language.

The Oimen decision upheld the felony murder conviction of the "mastermind" of an armed burglary which resulted in the shooting death of his co-felon by the intended victim of the burglary. The death occurred as the co-felon fled the scene.

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1031 FELONY MURDER: UNDERLYING CRIME ATTEMPTED — § 940.03

Statutory Definition of the Crime

Felony murder, as defined in § 940.03 of the Criminal Code of Wisconsin, is committed by one who causes the death of another human being while attempting to commit the crime of (name of crime).[1]

State's Burden of Proof

Before you may find the defendant guilty of felony murder, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following elements were present.

Elements of Felony Murder That the State Must Prove

1. The defendant attempted to commit the crime of (name of crime).
2. The death of (name of victim) was caused by the attempt to commit (name of crime).[2]

Determining Whether the Defendant Attempted to Commit (name of crime)

The first element of felony murder requires that the defendant attempted to commit the crime of (name of crime).

The crime of attempted (name of crime), as defined in § 939.32 and § ____[3] of the Criminal Code of Wisconsin, is committed by one who, with intent to commit (name of crime) does acts toward the commission of that crime which demonstrate unequivocally, under all of the circumstances, that he or she had formed that intent and would commit the crime except for the intervention of another person or some other extraneous factor.[4]

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First consider whether the defendant intended to commit (name of crime).

(Name of crime) is committed by one who

LIST THE ELEMENTS OF THE INTENDED CRIME AS IDENTIFIED IN THE UNIFORM INSTRUCTION. ADD DEFINITIONS FROM THE UNIFORM INSTRUCTIONS AS NECESSARY.[5]

The crime involved in this case, however, is not (name of crime) as defined, but an attempt to commit the crime of (name of crime).

Next consider whether the defendant did acts toward the commission of the crime of (name of crime) which demonstrate unequivocally, under all of the circumstances, that the defendant intended to and would have committed the crime of (name of crime) except for the intervention of another person or some other extraneous factor.

Meaning of "Unequivocally"

"Unequivocally" means that no other inference or conclusion can reasonably and fairly be drawn from the defendant's acts, under the circumstances.

Meaning of "Another Person"

"Another person" means anyone but the defendant and may include the intended victim.

Meaning of "Extraneous Factor"

An "extraneous factor" is something outside the knowledge of the defendant or outside the defendant's control.

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Deciding About Intent

You cannot look into a person's mind to find intent. Intent must be found, if found at all, from the defendant's acts, words, and statements, if any, and from all the facts and circumstances in this case bearing upon intent.

Determining Whether Death was Caused by the Attempt to Commit of (name of crime)

The second element of felony murder requires that the death of (name of victim) was caused by the attempt to commit (name of crime).

The Meaning of "Cause"

"Cause" means that the attempt to commit (name of crime) was a substantial factor in producing the death.[6]

ADD THE FOLLOWING IN CASES INVOLVING THE IMMEDIATE FLIGHT FROM AN ATTEMPTED FELONY.[7]

[The phrase "the attempt to commit" the crime includes the period of immediate flight from that crime.]

Jury's Decision on Felony Murder

If you are satisfied beyond a reasonable doubt that the defendant attempted to commit the crime of (name of crime) and that the death of (name of victim) was caused by the attempt to commit (name of crime), you should find the defendant guilty of felony murder.

If you are not so satisfied, you must find the defendant not guilty.

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COMMENT

Wis JI-Criminal 1031 was originally published in 2003 and revised in 2007. The 2007 revision reflected the addition of several felonies to the list of those that can provide the predicate for a felony murder charge. This revision was approved by the Committee in December 2012; it updated the Comment.

This instruction is for a felony murder case based on the attempt to commit the underlying felony. For cases involving complete commission of the underlying felony, see Wis JI-Criminal 1030. For cases based on committing the felony as a party to the crime, see Wis JI-Criminal 1032.

2005 Wisconsin Act 313 amended §940.03, Felony murder, to add the following offenses as predicate offenses:

- § 940.19 Battery
- § 940.195 Battery to an unborn child
- § 940.20 Battery: special circumstances
- § 940.201 Battery or threat to witness
- § 940.203 Battery or threat to judge
- § 940.30 False imprisonment
- § 940.31 Kidnapping

The complete list of predicate offenses is provided in footnote 1. The list of uniform criminal jury instructions for the predicate offenses is provided in footnote 4.

Note that the offenses added by Act 313 include two offenses that define misdemeanor offenses: § 940.19(1) and § 940.195(1). It is not clear whether the application of the revised felony murder statute was intended to be based on the commission of a misdemeanor. Wisconsin had misdemeanor manslaughter statutes until the Criminal Code was revised in 1955. See, for example, § 340.10, 1953 Wis. Stats.

The penalty for violating § 940.03, as amended by 2001 Wisconsin Act 109, is imprisonment for not more than 15 years in excess of the maximum term of imprisonment for the underlying crime. This was a change from 20 years under prior law. Adding 15 years to the total term of imprisonment yields a new "unclassified felony" under § 973.01(2)(b)10. 75% of the term is the maximum period of confinement; 25% of the term is the extended supervision maximum. State v. Mason, 2004 WI App 176, 276 Wis.2d 434, 687 N.W.2d 526.

The underlying felony is a lesser included offense of felony murder. State v. Carlson, 5 Wis.2d 595, 608, 93 N.W.2d 355 (1958); State v. Gordon, 111 Wis.2d 133, 330 N.W.2d 564 (1983). Thus, the felony could be submitted to the jury as a lesser included offense if the evidentiary standard is met; it should not be charged as separate count. Carlson dealt with § 940.03 of the statutes in effect in 1957, defining "third degree murder." The current statute is essentially the same as the statute in Carlson, except it is limited to designated felonies. Carlson held that "the correct procedure" would be:

> in the first instance to bring but a single charge of third-degree murder and for the court to submit to the jury verdicts of third-degree murder, arson, and not guilty. The arson could properly be submitted to the jury because it is an included crime within the meaning of sec. 939.66(1) of the Criminal Code. But the jury should be instructed to sign but one verdict, so that if they found the defendant guilty of third-degree murder they would make no finding with respect to the separate form of verdict of arson. On the other hand if they found the defendant not guilty of third-degree

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murder they might still find him guilty of arson, if they found that he set the fire but that it did not cause the death.
5 Wis.2d 595, 608-9.

The felony murder statute applies to a situation where a co-felon is killed by the intended victim of the felony. State v. Oimen, 184 Wis.2d 423, 516 N.W.2d 399 (1994). It also applies when a person present at the crime is killed by the intended victim of the felony. State v. Rivera, 184 Wis.2d 485, 516 N.W.2d 391 (1994). In both cases, the court held that the plain language of the statute applies: the defendants caused the death while committing the felony. The so-called agency approach that limits liability in similar situations in some jurisdictions was rejected.

In Oimen, the court also addressed the proper way to integrate party to the crime with felony murder: ". . . [W]e wish to point out that [Oimen] should not have been charged as a party to the crime of felony murder. Oimen was appropriately charged as a party to the underlying offense, attempted armed robbery. Charging felony murder as a party to the crime is redundant and unnecessary. A person convicted of a felony as a party to the crime becomes a principal to a murder occurring as a result of that felony." 184 Wis.2d 423, 449. The court of appeals affirmed a conviction for felony murder, party to the crime, in a case decided shortly before Oimen. See State v. Chambers, 183 Wis.2d 316, 515 N.W.2d 531 (Ct. App. 1994). See Wis JI-Criminal 1032 and 1032 EXAMPLE for uniform instructions combining felony murder and party to the crime.

In State v. Briggs, 218 Wis.2d 61, 579 N.W.2d 783 (Ct. App., 1998), the court held that there is no crime of "attempted felony murder," meaning that the defendant must be allowed to withdraw his negotiated plea of no contest to that offense. Briggs and his accomplice were interrupted by the victim as they were stealing her car and ordered her back into the house at gun point. They forced her to the floor, placed a pillow over her head, and Briggs's companion shot her in the head, causing her very serious, permanent injuries. Briggs was charged as party to the crimes of attempted first-degree intentional homicide, armed car theft, armed robbery, armed burglary, and criminal damage to property. He reached an agreement with the state to plead no contest to both counts of an amended information charging him with attempted felony murder and armed burglary, both as a party to crime. He later moved to vacate his conviction, contending that the circuit court lacked subject-matter jurisdiction because the crime of attempted felony murder does not exist. The court of appeals agreed, relying in part on State v. Carter, 44 Wis.2d 151, 155, 170 N.W.2d 681, 683 (1969), which had concluded that felony murder does not require intent, and therefore, "is not reconcilable with the concept of attempt."

1. As amended by 2005 Wisconsin Act 313, § 940.03 specifies thirteen statutes defining crimes that can be the basis for a felony murder charge. The thirteen crimes are:

- § 940.19 Battery
- § 940.195 Battery to an unborn child
- § 940.20 Battery: special circumstances
- § 940.201 Battery or threat to witness
- § 940.203 Battery or threat to judge
- § 940.225(1) First Degree Sexual Assault
- § 940.225(2)(a) Second Degree Sexual Assault
- § 940.30 False imprisonment
- § 940.31 Kidnapping
- § 943.02 Arson
- § 943.10(2) Aggravated Burglary

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- § 943.23(1g) "Carjacking"
- § 943.32(2) Armed Robbery

As to violations of § 940.225(1), note that sexual contact or sexual intercourse under three different circumstances could be involved:

(a) without consent and causing pregnancy or great bodily harm
(b) without consent by use or threat of a dangerous weapon or article
(c) without consent, while aided and abetted and by use or threat of force.

2. "While committing or attempting to commit" is the phrase used by § 940.03 to identify the connection between the underlying felony and the death. In applying the statutory phrase in the instruction, the Committee adopted the following rationale: the defendant causes the death if he or she was concerned in the commission of the felony and the commission of the felony caused the death. This is consistent with the rationale in the Oimen and Rivera cases, see the comment preceding note 1, and was approved as a correct statement of the law in State v. Krawczyk, 2003 WI App 6, ¶ 23, 259 Wis.2d 843, 657 N.W.2d 77. For a charge based on an attempted felony, the statement is modified to refer to death being caused by the attempt to commit the felony.

The version of the Wisconsin felony murder statute that preceded current § 940.03 required that the death be caused "as a natural and probable consequence of the commission of or attempt to commit a felony." The nature of the connection between the felony and the death has been a source of considerable difficulty in many states which have felony murder statutes. See the Introductory Comment at Wis JI-Criminal 1000 and LaFave and Scott, Substantive Criminal Law, Vol. 2, pages 222-28 (West 1986).

Some of the difficulty in defining the connection between the causing of death and the commission of the felony has been the result of the wide range of felonies to which the felony murder rule could apply. Wisconsin's statute addresses that problem by specifying a limited number of felonies. Thus, it could be argued that it is appropriate to extend liability for deaths caused by those felonies, even to those deaths that are more remote.

The other issue that may come up with respect to the cause issue involves relating the time of the death to the time the felony was committed. Since § 940.03 specifically includes attempts to commit the named felonies, the primary questions are likely to arise with respect to deaths caused after the felony is technically complete. For example, does the statute apply to deaths caused by the felon while fleeing the scene of the crime? Statutes in some states include deaths caused "while fleeing immediately after committing" a felony (§ 2903.01, Ohio Rev. Codes) or those caused in the "immediate flight after committing" the felony (17-A § 202, Me. Rev. Stats.). Wisconsin has reached the same result by case law. See note 6, below.

The Committee concluded that questions about the connection between the felony and deaths caused after the felony is committed are best resolved by asking: Did the commission of the felony cause the death? As stated in the LaFave treatise: ". . . If this causal connection does exist, the killing may take place at some time before or after . . . whether there was sufficient causal connection between the felony and the homicide depends on whether the defendant's felony dictated his conduct which led to the homicide." LaFave and Scott, Substantive Criminal Law, Vol. 2, pages 222 and 227 (West 1986).

3. Here include the statute violated, for example: "The crime of first degree sexual assault, as defined in § 940.225(1)(a) of the Criminal Code of Wisconsin. . ." This is the way the first sentence of the uniform instruction for the underlying felony will read.

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4. This statement and the material immediately following are based on Wis JI-Criminal 580, Attempt. See the Comment and footnotes for that instruction for explanation of the issues relating to defining attempt.

5. The uniform jury instructions for the potential underlying felonies are as follows:

- for § 940.19 Battery – Wis JI-Criminal 1220-1226
- for § 940.195 Battery to an unborn child – Wis JI-Criminal 1227
- for § 940.20 Battery: special circumstances – Wis JI-Criminal 1228-1237
- for § 940.201 Battery or threat to witness – Wis JI-Criminal 1238
- for § 940.203 Battery or threat to judge – Wis JI-Criminal 1248
- for § 940.225(1) First Degree Sexual Assault – Wis JI-Criminal 1200-1207
- for § 940.225(2)(a) Second Degree Sexual Assault – Wis JI-Criminal 1208, 1209
- for § 940.30 False imprisonment – Wis JI-Criminal 1275
- for § 940.31 Kidnapping – Wis JI-Criminal 1280-1282
- for § 943.02 Arson – Wis JI-Criminal 1404, 1405
- for § 943.10(2) Armed Burglary – Wis JI-Criminal 1422
- for § 943.23(1g) "Carjacking" – Wis JI-Criminal 1463
- for § 943.32(2) Armed Robbery – Wis JI-Criminal 1480, 1480A

If an attempt to commit one of these felonies is the basis for the charge, Wis JI-Criminal 1031 provides a model.

6. The Committee concluded that the simple "substantial factor" definition of cause should be sufficient for most cases. Where there is evidence of more than one possible cause, something like the following might be added immediately preceding the sentence in the instruction beginning with "before":

> There may be more than one cause of death. The act of one person alone might produce it, or the acts of two or more persons might jointly produce it.

Also see Wis JI-Criminal 901, Cause.

7. In State v. Oimen, 184 Wis.2d 423, 428, 516 N.W.2d 399 (1994), the Wisconsin Supreme Court concluded "as a matter of law that the phrase in § 940.03, 'while committing or attempting to commit', encompasses the immediate flight from a felony." The court further directed that in the future, courts should utilize an instruction that includes the quoted language.

The Oimen decision upheld the felony murder conviction of the "mastermind" of an armed burglary which resulted in the shooting death of his co-felon by the intended victim of the burglary. The death occurred as the co-felon fled the scene.

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1032 FELONY MURDER: DEATH CAUSED WHILE COMMITTING A CRIME AS A PARTY TO THE CRIME: AIDING AND ABETTING — §§ 940.03 and 939.05

Statutory Definition of the Crime

Felony murder, as defined in § 940.03 of the Criminal Code of Wisconsin, is committed by one who causes the death of another human being while committing[1] the crime of (name of crime)[2] as a party to the crime.

State's Burden of Proof

Before you may find the defendant guilty of felony murder, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following elements were present.

Elements of Felony Murder That the State Must Prove

1. The defendant was a party to the crime of (name of crime).
2. The death of (name of victim) was caused by the commission of the (name of crime).[3]

Determining Whether the Defendant Was A Party To the Crime of (name of crime)

The first element of felony murder requires that the defendant was a party to the crime of (name of crime). This determination has two parts. I will first define what it means to be a party to the crime, which is the first part. Then I will define the elements of (name of crime), which is the second part.

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Party To A Crime

"Party to a crime" means that all persons concerned in the commission of a crime may be found to have committed that crime although they did not commit it directly.[4]

The State contends[5] that the defendant was concerned in the commission of the crime of (name of crime) by either directly committing it or by intentionally aiding and abetting the person who directly committed it. If a person intentionally aids and abets the commission of a crime, then that person is guilty of the crime as well as the person who directly committed it.

Definition of Aiding and Abetting

A person intentionally aids and abets the commission of a crime when, acting with knowledge or belief that another person is committing or intends to commit a crime, (he) (she) knowingly either

- assists the person who commits the crime, or
- is ready and willing to assist and the person who commits the crime knows of the willingness to assist.

To intentionally aid and abet (name of crime), the defendant must know that another person is committing or intends to commit the crime of (name of crime) and have the purpose to assist the commission of that crime.[6]

[USE THE FOLLOWING IF SUPPORTED BY THE EVIDENCE.]

(However, a person does not aid and abet if (he) (she) is only a bystander or spectator and does nothing to assist the commission of a crime.)

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Jury's Decision — Party To A Crime

Before you may find that the defendant was a party to the crime of (name of crime), the State must prove by evidence which satisfies you beyond a reasonable doubt that the defendant directly committed the crime of (name of crime) or that the defendant intentionally aided and abetted the commission of that crime.

Unanimous Agreement Not Required Regarding Theory Of Party To A Crime

All twelve jurors do not have to agree as to whether the defendant directly committed the crime or aided and abetted the commission of the crime. However, each juror must be convinced beyond a reasonable doubt that the defendant was concerned in the commission of the crime in one of those ways.[7]

Elements of (name of crime) That the State Must Prove

Now I will define the elements of (name of crime).

(Name of crime), as defined in section ____[8] of the Criminal Code of Wisconsin, is committed by one who (here refer to the instruction for the underlying crime to fully define the elements of that crime).[9]

Determining Whether Death was Caused by the Commission of (name of crime)

The second element of felony murder requires that the death of (name of victim) was caused by the commission of the (name of crime).[10]

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The Meaning of "Cause"

"Cause" means that the commission of the (name of crime) was a substantial factor in producing the death.[11]

ADD THE FOLLOWING IN CASES INVOLVING THE IMMEDIATE FLIGHT FROM A FELONY.[12]

[The phrase "the commission of" the crime includes the period of immediate flight from that crime.]

Jury's Decision on Felony Murder

If you are satisfied beyond a reasonable doubt that the defendant was a party to the crime of (name of crime) and that the death of (name of victim) was caused by the commission of (name of crime) as that crime has been defined, you should find the defendant guilty of felony murder.

If you are not so satisfied, you must find the defendant not guilty.

COMMENT

Wis JI-Criminal 1032 was originally published in 1998 and revised in 2003 and 2007. The 2007 revision reflected the addition of several felonies to the list of those that can provide the predicate for a felony murder charge. This revision was approved by the Committee in December 2012; it updated the Comment.

This instruction tailors Wis JI-Criminal 1030, Felony Murder, to a case based on the defendant's being party to the felony that caused the death. It integrates material from Wis JI-Criminal 400, Party To Crime: Aiding and Abetting: Defendant Either Directly Committed Or Intentionally Aided the Crime Charged, and Wis JI-Criminal 1030, Felony Murder.

2005 Wisconsin Act 313 amended §940.03, Felony murder, to add the following offenses as predicate offenses:

- § 940.19 Battery
- § 940.195 Battery to an unborn child
- § 940.20 Battery: special circumstances

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- § 940.201 Battery or threat to witness
- § 940.203 Battery or threat to judge
- § 940.30 False imprisonment
- § 940.31 Kidnapping

The complete list of predicate offenses is provided in footnote 1. The list of uniform criminal jury instructions for the predicate offenses is provided in footnote 4.

Note that the offenses added by Act 313 include two offenses that define misdemeanor offenses: § 940.19(1) and § 940.195(1). It is not clear whether the application of the revised felony murder statute was intended to be based on the commission of a misdemeanor. Wisconsin had misdemeanor manslaughter statutes until the Criminal Code was revised in 1955. See, for example, § 340.10, 1953 Wis. Stats.

The penalty for violating § 940.03, as amended by 2001 Wisconsin Act 109, is imprisonment for not more than 15 years in excess of the maximum term of imprisonment for the underlying crime. This was a change from 20 years under prior law. Adding 15 years to the total term of imprisonment yields a new "unclassified felony" under § 973.01(2)(b)10. 75% of the term is the maximum period of confinement; 25% of the term is the extended supervision maximum. State v. Mason, 2004 WI App 176, 276 Wis.2d 434, 687 N.W.2d 526.

The proper way to integrate party to the crime with felony murder was addressed by the Wisconsin Supreme Court in State v. Oimen, 184 Wis.2d 423, 449, 516 N.W.2d 399 (1994):

> . . . [W]e wish to point out that [Oimen] should not have been charged as a party to the crime of felony murder. Oimen was appropriately charged as a party to the underlying offense, attempted armed robbery. Charging felony murder as a party to the crime is redundant and unnecessary. A person convicted of a felony as a party to the crime becomes a principal to a murder occurring as a result of that felony.

1. This instruction is for the case where the underlying felony was committed. For a case based on the attempt to commit the underlying felony, this instruction must be adapted to the format provided in Wis JI-Criminal 1031.

2. As amended by 2005 Wisconsin Act 313, § 940.03 specifies thirteen statutes defining crimes that can be the basis for a felony murder charge. The thirteen crimes are:

- § 940.19 Battery
- § 940.195 Battery to an unborn child
- § 940.20 Battery: special circumstances
- § 940.201 Battery or threat to witness
- § 940.203 Battery or threat to judge
- § 940.225(1) First Degree Sexual Assault
- § 940.225(2)(a) Second Degree Sexual Assault
- § 940.30 False imprisonment
- § 940.31 Kidnapping
- § 943.02 Arson
- § 943.10(2) Aggravated Burglary
- § 943.23(1g) "Carjacking"
- § 943.32(2) Armed Robbery

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As to violations of § 940.225(1), note that sexual contact or sexual intercourse under three different circumstances could be involved:

(a) without consent and causing pregnancy or great bodily harm
(b) without consent by use or threat of a dangerous weapon or article
(c) without consent, while aided and abetted and by use or threat of force.

3. "While committing or attempting to commit" is the phrase used by § 940.03 to identify the connection between the underlying felony and the death. In applying the statutory phrase in the instruction, the Committee adopted the following rationale: the defendant causes the death if he or she was concerned in the commission of the felony and the commission of the felony caused the death. This is consistent with the rationale in the Oimen and Rivera cases, see the comment preceding note 1, and was approved as a correct statement of the law in State v. Krawczyk, 2003 WI App 6, ¶ 23, 259 Wis.2d 843, 657 N.W.2d 77.

The version of the Wisconsin felony murder statute that preceded current § 940.03 required that the death be caused "as a natural and probable consequence of the commission of or attempt to commit a felony." The nature of the connection between the felony and the death has been a source of considerable difficulty in many states which have felony murder statutes. See the Introductory Comment at Wis JI-Criminal 1000 and LaFave and Scott, Substantive Criminal Law, Vol. 2, pages 222-28 (West 1986).

Some of the difficulty in defining the connection between the causing of death and the commission of the felony has been the result of the wide range of felonies to which the felony murder rule could apply. Wisconsin's statute addresses that problem by specifying a limited number of felonies. Thus, it could be argued that it is appropriate to extend liability for deaths caused by those felonies, even to those deaths that are more remote.

The other issue that may come up with respect to the cause issue involves relating the time of the death to the time the felony was committed. Since § 940.03 specifically includes attempts to commit the named felonies, the primary questions are likely to arise with respect to deaths caused after the felony is technically complete. For example, does the statute apply to deaths caused by the felon while fleeing the scene of the crime? Statutes in some states include deaths caused "while fleeing immediately after committing" a felony (§ 2903.01, Ohio Rev. Codes) or those caused in the "immediate flight after committing" the felony (17-A § 202, Me. Rev. Stats.). Wisconsin has reached the same result by case law. See note 6, below.

The Committee concluded that questions about the connection between the felony and deaths caused after the felony is committed are best resolved by asking: Did the commission of the felony cause the death? As stated in the LaFave treatise: ". . . If this causal connection does exist, the killing may take place at some time before or after . . . whether there was sufficient causal connection between the felony and the homicide depends on whether the defendant's felony dictated his conduct which led to the homicide." LaFave and Scott, Substantive Criminal Law, Vol. 2, pages 222 and 227 (West 1986).

4. This is a paraphrase of § 939.05(2), which provides: "Whoever is concerned in the commission of a crime is a principal and may be charged with and convicted of the commission of the crime although the person did not directly commit it. . . ."

5. It is recommended, but not required, that the state indicate in the charging document that a party to crime theory of liability will be relied upon. LaVigne v. State, 32 Wis.2d 190, 194, 145 N.W.2d 175 (1966). If the defendant has not been charged as a party to crime, the material in the second set of brackets should be used.

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6. The definition of "intentionally" deals with the clear-cut case where the defendant acted with the purpose to assist the commission of the crime charged. "Intentionally" is also defined to include one who is aware that his or her conduct is practically certain to cause the result specified. See § 939.23(3) and Wis JI-Criminal 923.2. For a case involving the "natural and probable consequences" variation of aiding and abetting, see Wis JI-Criminal 406.

7. The jurors need not be instructed that they must unanimously agree on the basis of liability, that is, whether the defendant directly committed the crime or aided and abetted its commission. Holland v. State, 91 Wis.2d 134, 280 N.W.2d 288 (1979).

8. Here include the statute violated, for example: "The crime of first degree sexual assault, as defined in § 940.225(1)(a) of the Criminal Code of Wisconsin. . ." This is the way the first sentence of the uniform instruction for the underlying felony will read.

9. The uniform jury instructions for the potential underlying felonies are as follows:

- for § 940.19 Battery – Wis JI-Criminal 1220-1226
- for § 940.195 Battery to an unborn child – Wis JI-Criminal 1227
- for § 940.20 Battery: special circumstances – Wis JI-Criminal 1228-1237
- for § 940.201 Battery or threat to witness – Wis JI-Criminal 1238
- for § 940.203 Battery or threat to judge – Wis JI-Criminal 1248
- for § 940.225(1) First Degree Sexual Assault – Wis JI-Criminal 1200-1207
- for § 940.225(2)(a) Second Degree Sexual Assault – Wis JI-Criminal 1208, 1209
- for § 940.30 False imprisonment – Wis JI-Criminal 1275
- for § 940.31 Kidnapping – Wis JI-Criminal 1280-1282
- for § 943.02 Arson – Wis JI-Criminal 1404, 1405
- for § 943.10(2) Armed Burglary – Wis JI-Criminal 1422
- for § 943.23(1g) "Carjacking" – Wis JI-Criminal 1463
- for § 943.32(2) Armed Robbery – Wis JI-Criminal 1480, 1480A

If an attempt to commit one of these felonies is the basis for the charge, Wis JI-Criminal 1031 provides a model.

10. See note 2, supra.

11. The Committee concluded that the simple "substantial factor" definition of cause should be sufficient for most cases. Where there is evidence of more than one possible cause, something like the following might be added immediately preceding the sentence in the instruction beginning with "before":

> There may be more than one cause of death. The act of one person alone might produce it, or the acts of two or more persons might jointly produce it.

Also see Wis JI-Criminal 901, Cause.

12. In State v. Oimen, 184 Wis.2d 423, 428, 516 N.W.2d 399 (1994), the Wisconsin Supreme Court concluded "as a matter of law that the phrase in § 940.03, 'while committing or attempting to commit', encompasses the immediate flight from a felony." The court further directed that in the future, courts should utilize an instruction that includes the quoted language.

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The Oimen decision upheld the felony murder conviction of the "mastermind" of an armed burglary which resulted in the shooting death of his co-felon by the intended victim of the burglary. The death occurred as the co-felon fled the scene.

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1032 EXAMPLE FELONY MURDER: DEATH CAUSED WHILE COMMITTING ARMED BURGLARY AS A PARTY TO THE CRIME: AIDING AND ABETTING — §§ 940.03; 943.10(2), 939.05

Statutory Definition of the Crime

Felony murder, as defined in § 940.03 of the Criminal Code of Wisconsin, is committed by one who causes the death of another human being while committing the crime of armed burglary as a party to the crime.

State's Burden of Proof

Before you may find the defendant guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following are present.

1. The defendant was a party to the crime of armed burglary.
2. The death of (name of victim) was caused by the commission of the armed burglary.

Determining Whether the Defendant Was A Party To the Crime of Armed Burglary

The first element of felony murder requires that the defendant was a party to the crime of armed burglary. This determination has two parts. I will first define what it means to be a party to the crime, which is the first part. Then I will define the elements of armed burglary, which is the second part.

Party To A Crime

"Party to a crime" means that all persons concerned in the commission of a crime may be found to have committed that crime although they did not commit it directly.

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The State contends that the defendant was concerned in the commission of the crime of armed burglary by either directly committing it or by intentionally aiding and abetting the person who directly committed it. If a person intentionally aids and abets the commission of a crime, then that person is guilty of the crime as well as the person who directly committed it.

Definition of Aiding and Abetting

A person intentionally aids and abets the commission of a crime when, acting with knowledge or belief that another person is committing or intends to commit a crime, (he) (she) knowingly either

- assists the person who commits the crime, or
- is ready and willing to assist and the person who commits the crime knows of the willingness to assist.

To intentionally aid and abet armed burglary, the defendant must know that another person is committing or intends to commit the crime of armed burglary and have the purpose to assist the commission of that crime.

[USE THE FOLLOWING IF SUPPORTED BY THE EVIDENCE.]

(However, a person does not aid and abet if (he) (she) is only a bystander or spectator and does nothing to assist the commission of a crime.)

Jury's Decision — Party To A Crime

Before you may find that the defendant was a party to the crime of armed burglary, the State must prove by evidence which satisfies you beyond a reasonable doubt that the defendant

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directly committed the crime of armed burglary or that the defendant intentionally aided and abetted the commission of that crime.

Unanimous Agreement Not Required Regarding Theory Of Party To A Crime

All twelve jurors do not have to agree as to whether the defendant directly committed the crime or aided and abetted the commission of the crime. However, each juror must be convinced beyond a reasonable doubt that the defendant was concerned in the commission of the crime in one of those ways.

Elements of Armed Burglary That the State Must Prove

Now I will define the elements of armed burglary.

Armed burglary, as defined in § 943.10(2) of the Criminal Code of Wisconsin, is committed by one who intentionally enters a building without the consent of the person in lawful possession and with intent to steal.

State's Burden of Proof

Before you may find that armed burglary was committed, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following five elements were present.

1. The defendant intentionally entered a building.
2. The defendant entered the building without the consent of the person in lawful possession.
3. The defendant knew that the entry was without consent.

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4. The defendant entered the building with intent to steal.

"Intent to steal" requires that the defendant had the mental purpose to take and carry away movable property of another without consent and that the defendant intended to deprive the owner permanently of possession of the property. [It requires that the defendant knew the property belonged to another and knew the person did not consent to the taking of the property.]

5. The defendant or (name of other person) entered the building while armed with a dangerous weapon.

"Dangerous weapon" means _____.[1]

"Armed" means that at the time of the entry the weapon must have been either on the defendant's person or within the defendant's reach. In addition, the defendant must have been aware of the presence of the weapon.

When Must Intent Exist?

The intent to steal must be formed before entry is made. The intent to steal, which is an essential element of burglary, is no more or less than the mental purpose to steal formed at any time before the entry, which continued to exist at the time of the entry.

Deciding About Intent and Knowledge

You cannot look into a person's mind to find intent and knowledge. Intent and knowledge must be found, if found at all, from the defendant's acts, words, and statements, if any, and from all the facts and circumstances in this case bearing upon intent and knowledge.

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Jury's Decision on Armed Burglary

If you are satisfied beyond a reasonable doubt that the defendant was a party to the crime of armed burglary, you should determine whether the death of (name of victim) was caused by the commission of the armed burglary.

The Meaning of "Cause"

"Cause" means that the commission of the armed burglary was a substantial factor in producing the death.

ADD THE FOLLOWING IN CASES INVOLVING THE IMMEDIATE FLIGHT FROM A FELONY.

[The phrase "the commission of the crime" includes the period of immediate flight from that crime.]

Jury's Decision on Felony Murder

If you are satisfied beyond a reasonable doubt that the defendant was a party to the crime of armed burglary and that the death of (name of victim) was caused by the commission of armed burglary as that crime has been defined, you should find the defendant guilty of felony murder.

If you are not so satisfied, you must find the defendant not guilty.

COMMENT

Wis JI-Criminal 1032 EXAMPLE was originally published in 1989. This revision was approved by the Committee in April 2003; it adopted a new format.

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This instruction adapts Wis JI-Criminal 1032 to case involving a felony murder based on the defendant's being party to the crime of armed burglary. It integrates material from four uniform instructions: Wis JI-Criminal 400, Party To Crime: Aiding and Abetting: Defendant Either Directly Committed Or Intentionally Aided the Crime Charged; Wis JI-Criminal 1032, Felony Murder: Death Caused While Committing A Felony As A Party To The Crime; Wis JI-Criminal 1421, Burglary With Intent To Steal; and, Wis JI-Criminal 1425A, Burglary While Armed.

This offense was chosen for the example in part because there is not a uniform instruction that integrates the "armed" component of armed burglary with the burglary instruction. Rather, it is treated as a special question. See Wis JI-Criminal 1425A. Footnotes are omitted from this instruction. A fully annotated model for felony murder is provided at Wis JI-Criminal 1032. See the other instructions cited above for footnotes specific to those components.

The penalty for violating § 940.03, as amended by 2001 Wisconsin Act 109, is imprisonment for not more than 15 years in excess of the maximum term of imprisonment for the underlying crime. This is a change from 20 years under prior law. For crimes committee on or after February 1, 2003, the penalty for armed burglary under § 943.10(2) is a Class E felony.

1. See Wis JI-Criminal 910 for an instruction on "dangerous weapon."

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1050 SECOND DEGREE INTENTIONAL HOMICIDE — § 940.05[1]

Statutory Definition of the Crime

Second degree intentional homicide, as defined in § 940.05 of the Criminal Code of Wisconsin, is committed by one who causes the death of another human being with intent to kill that person or another.[2]

State's Burden of Proof

Before you may find the defendant guilty of second degree intentional homicide, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following two elements were present.

Elements of the Crime That the State Must Prove

1. The defendant caused the death of (name of victim).

   "Cause" means that the defendant's act was a substantial factor in producing the death.[3]

2. The defendant acted with the intent to kill ((name of victim)) (another human being).[4]

   "Intent to kill" means that the defendant had the mental purpose to take the life of another human being or was aware that (his) (her) conduct was practically certain to cause the death of another human being.[5]

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When May Intent Exist?

While the law requires that the defendant acted with intent to kill, it does not require that the intent exist for any particular length of time before the act is committed. The act need not be brooded over, considered, or reflected upon for a week, a day, an hour, or even for a minute. There need not be any appreciable time between the formation of the intent and the act. The intent to kill may formed at any time before the act, including the instant before the act, and must continue to exist at the time of the act.

Deciding About Intent

You cannot look into a person's mind to find intent. Intent to kill must be found, if found at all, from the defendant's acts, words, and statements, if any, and from all the facts and circumstances in this case bearing upon intent.[6]

Intent and Motive

Intent should not be confused with motive. While proof of intent is necessary to a conviction, proof of motive is not. "Motive" refers to a person's reason for doing something. While motive may be shown as a circumstance to aid in establishing the guilt of a defendant, the State is not required to prove motive on the part of a defendant in order to convict. Evidence of motive does not by itself establish guilt. You should give it the weight you believe it deserves under all of the circumstances.

ADD THE FOLLOWING IF IT APPEARS THAT EVIDENCE OF PROVOCATION MAY HAVE AN EFFECT ON THE JURY'S CONSIDERATION OF THE CASE:[7]

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[Adequate provocation is not a defense to a charge of second degree intentional homicide.]

Jury's Decision

If you are satisfied beyond a reasonable doubt that the defendant caused the death of (name of victim) with the intent to kill, you should find the defendant guilty of second degree intentional homicide.

If you are not so satisfied, you must find the defendant not guilty.

COMMENT

Wis JI-Criminal 1050 was originally published in 1989. This revision was approved by the Committee in February 2006.

This instruction is for a violation of § 940.05, created by 1987 Wisconsin Act 399 as part of the revision of the homicide statutes. The statute applies to offenses committed on or after January 1, 1989.

This offense, second degree intentional homicide, is essentially the same as manslaughter under prior law.

1. This instruction is drafted for the case where second degree intentional homicide is charged. Though the charging document need not indicate why the second degree rather than the first degree offense is being charged, this instruction is drafted for a case where evidence of adequate provocation is in the case. See note 7, below.

For a case where second degree intentional homicide is submitted as a lesser included offense (because of evidence of adequate provocation), see Wis JI-Criminal 1012.

A charge of second degree intentional homicide could also lie where "unnecessary defensive force" mitigates what would otherwise be first degree intentional homicide. However, the complete privilege of self-defense could be a defense to that charge and would be likely to be raised by the evidence. See Wis JI-Criminal 1052.

2. The statement of the facts necessary to constitute second degree intentional homicide is the same as the one for the facts that constitute the offense of first degree intentional homicide under § 940.01. The difference between the two offenses is that certain matters are defenses to the first degree offense but not to the second degree offense. Thus, "unnecessary defensive force" and "adequate provocation," for example,

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mitigate first degree intentional homicide to second degree intentional homicide. The absence of the mitigating circumstance becomes the additional fact necessary to constitute the more serious crime, furnishing the distinction between the two degrees of intentional homicide. By charging the defendant with the second degree offense, the state is conceding that it could not have proven the absence of the mitigating circumstance had the first degree offense been charged.

3. The Committee has concluded that the simple "substantial factor" definition of cause should be sufficient for most cases. Where there is evidence of more than one possible cause, something like the following might be added:

> There may be more than once cause of death. The act of one person alone might produce it, or the acts of two or more persons might jointly produce it.

Also see Wis JI-Criminal 901, Cause.

4. The parenthetical reference to "another human being" is to be used in a case based on the theory that the defendant caused the death of the victim "with intent to kill another human being." Wisconsin's intentional homicide statutes incorporate the common law doctrine of "transferred intent." See note 3, Wis JI-Criminal 1010.

5. The phrase "or aware that his conduct is practically certain to cause that result" was added to the definition of "with intent to" found in § 939.23 by the 1988 revision of the homicide statutes. Further, the revision applied the § 939.23 definition to homicide offenses. Under prior law, "with intent to kill" was defined solely in terms of mental purpose for offenses in Chapter 940. See the discussion in Wis JI-Criminal 923B.

6. This is the shorter version used to describe the process of finding intent. The Committee has concluded that it is suitable for use in most cases. For the longer description of the intent-finding process, see Wis JI-Criminal 923A.

7. The statement in brackets ought to be unnecessary in most cases because in a prosecution under § 940.05, the state is required to prove only that the defendant caused the death of another with intent to kill. Adequate provocation is not a defense to a charge of second degree intentional homicide. Section 940.05(3). Evidence or argument advancing the proposition that the defendant is not guilty of second degree intentional homicide because of provocation is therefore inadmissible and improper. However, because evidence of provocation may be presented as part of the testimony describing the incident, it may be desirable to inform the jury that provocation has no effect on what the state must establish to support a guilty finding for second degree intentional homicide.

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1052 SECOND DEGREE INTENTIONAL HOMICIDE: SELF-DEFENSE — § 940.05[1]

Statutory Definition of the Crime

Second degree intentional homicide, as defined in § 940.05 of the Criminal Code of Wisconsin, is committed by one who causes the death of another human being with intent to kill that person or another.

You must also consider whether the defendant' conduct was privileged under the law of self-defense.

Self-Defense

The Criminal Code of Wisconsin provides that a person is privileged to intentionally use force against another under the following circumstances:

- force is used for the purpose of preventing or terminating what the person reasonably believes to be an unlawful interference with (his) (her) person by the other person; and,
- the person uses only the amount of force that (he) (she) reasonably believes is necessary to prevent or terminate the interference; and,
- the person may not intentionally use force which is intended or likely to cause death unless (he) (she) reasonably believes that such force is necessary to prevent imminent death or great bodily harm to (himself) (herself).[2]

As applied to this case, the effect of the law of self-defense is that if the defendant reasonably believed the force used was necessary to prevent imminent death or great bodily harm to (himself) (herself), the defendant is not guilty of second degree intentional homicide.

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State' Burden of Proof

Before you may find the defendant guilty of second degree intentional homicide, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following three elements were present.

Elements of the Crime That the State Must Prove

1. The defendant caused the death of (name of victim).

   "Cause" means that the defendant's act was a substantial factor in producing the death.[3]

2. The defendant acted with the intent to kill ((name of victim)) (another human being).[4]

   "Intent to kill" means that the defendant had the mental purpose to take the life of another human being or was aware that (his) (her) conduct was practically certain to cause the death of another human being.[5]

3. The defendant did not reasonably believe that (he) (she) was preventing or terminating an unlawful interference with (his) (her) person or did not reasonably believe that the force used was necessary prevent imminent death or great bodily harm to (himself) (herself).[6]

When May Intent Exist?

While the law requires that the defendant acted with intent to kill, it does not require that the intent exist for any particular length of time before the act is committed. The act need

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not be brooded over, considered, or reflected upon for a week, a day, an hour, or even for a minute. There need not be any appreciable time between the formation of the intent and the act. The intent to kill may formed at any time before the act, including the instant before the act, and must continue to exist at the time of the act.

Deciding About Intent

You cannot look into a person's mind to find intent. Intent to kill must be found, if found at all, from the defendant' acts, words, and statements, if any, and from all the facts and circumstances in this case bearing upon intent.[7]

Intent and Motive

Intent should not be confused with motive. While proof of intent is necessary to a conviction, proof of motive is not. "Motive" refers to a person' reason for doing something. While motive may be shown as a circumstance to aid in establishing the guilt of a defendant, the State is not required to prove motive on the part of a defendant in order to convict. Evidence of motive does not by itself establish guilt. You should give it the weight you believe it deserves under all of the circumstances.

Reasonable Belief That The Force Used Was Necessary

The third element of second degree intentional homicide requires that the defendant did not reasonably believe that (he) (she) was preventing or terminating an unlawful interference with (his) (her) person or did not reasonably believe the force used was necessary to prevent

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imminent death or great bodily harm to (himself) (herself). This requires that the State prove any one of the following:[8]

1) that a reasonable person in the circumstances of the defendant would not have believed that (he) (she) was preventing or terminating an unlawful interference with (his) (her) person; or

2) that a reasonable person in the circumstances of the defendant would not have believed (he) (she) was in danger of imminent death or great bodily harm; or

3) that a reasonable person in the circumstances of the defendant would not have believed that the amount of force used was necessary to prevent imminent death or great bodily harm to (himself) (herself).

The reasonableness of the defendant's belief must be determined from the standpoint of the defendant at the time of (his) (her) acts and not from the viewpoint of the jury now. The standard is what a person of ordinary intelligence and prudence would have believed in the position of the defendant under the circumstances existing at the time of the alleged offense.

Jury's Decision

If you are satisfied beyond a reasonable doubt that the defendant caused the death of (name of victim) with the intent to kill and did not reasonably believe that (he) (she) was preventing or terminating an unlawful interference with (his) (her) person or did not reasonably believe that the force used was necessary prevent imminent death or great bodily

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harm to (himself) (herself), you should find the defendant guilty of second degree intentional homicide.

If you are not so satisfied, you must find the defendant not guilty.

COMMENT

Wis JI-Criminal 1052 was originally published in 1989. This revision was approved by the Committee in February 2006.

This instruction is for a violation of § 940.05, created by 1987 Wisconsin Act 399 as part of the revision of the homicide statutes. The statute applies to offenses committed on or after January 1, 1989.

This offense, second degree intentional homicide, is essentially the same as manslaughter under prior law.

1. This instruction is drafted for the case where second degree intentional homicide is charged and where evidence of the complete privilege of self-defense is in the case. The absence of the privilege becomes a fact necessary to constitute the crime of second degree intentional homicide.

For a summary of the effect of self-defense in intentional homicide cases, see note 3, Wis JI-Criminal 1014. That instruction is drafted for a case where first degree intentional homicide is charged, there is evidence that the defendant acted in self defense, and the lesser included offense of second degree intentional homicide (unnecessary defensive force) is to be submitted to the jury.

2. These statements are based on the definition of the privilege of self-defense found in § 939.48.

3. The Committee has concluded that the simple "substantial factor" definition of cause should be sufficient for most cases. Where there is evidence of more than one possible cause, something like the following might be added:

> There may be more than once cause of death. The act of one person alone might produce it, or the acts of two or more persons might jointly produce it.

Also see Wis JI-Criminal 901, Cause.

4. The parenthetical reference to "another human being" is to be used in a case based on the theory that the defendant caused the death of the victim "with intent to kill another human being." Wisconsin's intentional homicide statutes incorporate the common law doctrine of "transferred intent." See note 3, Wis JI-Criminal 1010.

5. The phrase "or aware that his conduct is practically certain to cause that result" was added to the definition of "with intent to" found in § 939.23 by the 1988 revision of the homicide statutes. Further, the

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revision applied the § 939.23 definition to homicide offenses. Under prior law, "with intent to kill" was defined solely in terms of mental purpose for offenses in Chapter 940. See the discussion in Wis JI-Criminal 923B.

6. The absence of the complete privilege of self-defense is a fact necessary to constitute the offense of second degree intentional homicide, assuming there is "some evidence" of the complete privilege in the case. See State v. Head,2002 WI 99, 255 Wis.2d 194, 648 N.W.2d 413, State v. Peters, 2002 WI App 243, 258 Wis.2d 148, 653 N.W.2d 300, and the discussion in footnotes 13 and 15, Wis JI-Criminal 1014.

7. This is the shorter version used to describe the process of finding intent. The Committee has concluded that it is suitable for use in most cases. For the longer description of the intent-finding process, see Wis JI-Criminal 923A.

8. The exercise of the privilege may be proved to be unreasonable in any one of three ways: by showing that the defendant's belief that he or she was preventing or terminating an unlawful interference was unreasonable; or, by showing that the defendant's belief that he or she was in danger of imminent death or great bodily harm was unreasonable; or, by showing that the amount of force used was unreasonable. See State v. Head, note 6, supra, and note 15, Wis JI-Criminal 1014.

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1060 SECOND DEGREE RECKLESS HOMICIDE — § 940.06

Statutory Definition of the Crime

Second degree reckless homicide, as defined in § 940.06 of the Criminal Code of Wisconsin, is committed by one who recklessly causes the death of another human being.

State's Burden Of Proof

Before you may find the defendant guilty of second degree reckless homicide, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following two elements were present.

Elements of the Crime That the State Must Prove

1. The defendant caused the death of (name of victim).

   "Cause" means that the defendant's act was a substantial factor in producing the death.[1]

2. The defendant caused the death by criminally reckless conduct.

   "Criminally reckless conduct" means:[2]

   - the conduct created a risk of death or great bodily harm to another person; and
   - the risk of death or great bodily harm was unreasonable and substantial; and
   - the defendant was aware that (his) (her) conduct created the unreasonable and substantial risk of death or great bodily harm.[3]

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Jury's Decision

If you are satisfied beyond a reasonable doubt that the defendant caused the death of (name of victim) by criminally reckless conduct, you should find the defendant guilty of second degree reckless homicide.

If you are not so satisfied, you must find the defendant not guilty.

COMMENT

Wis JI-Criminal 1060 was originally published in 1989 and revised in 2002. This revision was approved by the Committee in March 2015; it revised footnote 3 to reflect 2013 Wisconsin Act 307.

This instruction is for violations of § 940.06, created by 1987 Wisconsin Act 399 as part of the revision of the homicide statutes. The statute applies to offenses committed on or after January 1, 1989. For a brief overview of the homicide revision, see the Introductory Comment at Wis JI-Criminal 1000. A comprehensive outline and discussion of the changes can be found in "The Importance of Clarity in the Law of Homicide: The Wisconsin Revision," by Walter Dickey, David Schultz, and James L. Fullin, Jr., 1989 Wisconsin Law Review 1325.

This offense, second degree reckless homicide, replaces what was called homicide by reckless conduct under prior law. It differs from first degree reckless homicide only in lacking the element of "circumstance which show utter disregard for human life." See Wis JI-Criminal 1020 for the instruction on first degree reckless homicide.

For a case involving second degree reckless homicide submitted as a lesser included offense where first degree reckless homicide is charged, see Wis JI-Criminal 1022.

Second degree reckless homicide is not a lesser included offense of homicide by intoxicated use of a vehicle under § 940.09. State v. Lechner, 217 Wis.2d 392, 576 N.W.2d 912 (1998). (Lechner concerned the 1993-94 Wisconsin Statutes, under which both § 940.06 and § 990.09 were Class C felonies.)

1. The Committee has concluded that the simple "substantial factor" definition of cause should be sufficient for most cases. Where there is evidence of more than one possible cause, something like the following might be added immediately preceding the sentence in the instruction beginning with "before":

> There may be more than one cause of death. The act of one person alone might produce it, or the acts of two or more persons might jointly produce it.

Also see, Wis JI-Criminal 901 Cause.

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2. "Criminal recklessness" is defined as follows in § 939.24(1):

> . . . 'criminal recklessness' means that the actor creates an unreasonable and substantial risk of death or great bodily harm to another human being and the actor is aware of that risk.

The Judicial Council Note to § 939.24, 1987 Senate Bill 191, explains that "[r]ecklessness requires both the creation of an objectively unreasonable and substantial risk of human death or great bodily harm and the actor's subjective awareness of that risk."

3. The statutory definition of "recklessness" clarifies that subjective awareness of the risk is required. That raises the possibility that intoxication could, as a factual matter, negate awareness of the risk. For that reason, the original definition of recklessness provided that if voluntary intoxication prevented the actor from being aware of the risk, it was not a defense. This rule was set forth in § 939.24(3):

> (3) A voluntarily produced intoxicated or drugged condition is not a defense to liability for criminal recklessness if, had the actor not been in that condition, he or she would have been aware of creating an unreasonable and substantial risk of death or great bodily harm to another human being.

The Judicial Council Note to subsection (3) explains it as follows:

> Subsection (3) continues the present rule that a voluntarily produced intoxicated or drugged condition is not a defense to liability for criminal recklessness. Ameen v. State, 51 Wis.2d 175, 185, 186 N.W.2d 206 (1971). Patterned on s. 2.08 of the model penal code, it premises liability on whether the actor would have been aware if not in such condition of the risk of death or great bodily harm. The commentaries to s. 2.08, model penal code, state the rationale of this rule in extended fashion.

Note to § 939.24(3), 1987 Senate Bill 191.

Section 939.42, the statute codifying both voluntary and involuntary intoxication defenses, was revised by 2013 Wisconsin Act 307 [effective date: April 18, 2014]. Reference to voluntary intoxication was eliminated; as amended, the statute refers only to involuntary intoxication. Act 307 also repealed former sub. (3) of § 939.24, thus getting rid of the special rule excluding voluntary intoxication as a defense to the "aware of the risk" element. For cases arising before the effective date of Act 307, the suggestion included in the previous version of this Comment would still apply: "In a case where there is evidence of intoxication, it may be helpful to advise the jury of the rule provided in subsection (3). The Committee concluded that simply reading the statute is the best way to provide the necessary information.

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1060A SECOND DEGREE RECKLESS HOMICIDE BY OMISSION — § 940.06

Statutory Definition of the Crime

Second degree reckless homicide, as defined in § 940.06 of the Criminal Code of Wisconsin, is committed by one who recklessly causes the death of another human being.

State's Burden Of Proof

Before you may find the defendant guilty of second degree reckless homicide, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following two elements were present.

Elements of the Crime That the State Must Prove

1. The defendant caused the death of (name of victim).

   "Cause" means that the defendant's act was a substantial factor in producing the death.[1]

2. The defendant caused the death by criminally reckless conduct.

   "Criminally reckless conduct" means:[2]

   - the conduct created a risk of death or great bodily harm to another person; and
   - the risk of death or great bodily harm was unreasonable and substantial; and
   - the defendant was aware that (his) (her) conduct created the unreasonable and substantial risk of death or great bodily harm.[3]

Criminally reckless conduct may be based on either an affirmative act or on a failure to act.

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Evidence has been received that the defendant committed second degree reckless homicide by failing to act. Criminal liability may be based on a failure to act when:

• the defendant has a legal duty to act.[4] In this case, it is alleged that the defendant had a legal duty to (identify the legal duty).[5]

• the defendant has knowledge of facts giving rise to the duty;[6]

• the defendant has the physical ability to act as the duty requires;[7] and,

• the defendant failed to act as the legal duty requires.

For criminal liability based on failure to act, the state must satisfy you beyond a reasonable doubt that all four of these requirements are present and that the defendant's failure to act constituted criminal recklessness.[8]

Jury's Decision

If you are satisfied beyond a reasonable doubt that the defendant caused the death of (name of victim) by criminally reckless conduct, you should find the defendant guilty of second degree reckless homicide.

If you are not so satisfied, you must find the defendant not guilty.

COMMENT

Wis JI-Criminal 1060A was approved by the Committee in March 2015.

This instruction is for violations of § 940.06 that are based on liability for omission, or failure to act. Criminal liability for an omission or failure to act is not codified in the Wisconsin Statutes but has been recognized in case law. See Wis JI-Criminal 905 for a freestanding instruction on omissions and an explanation of the basis for omission liability in Wisconsin. This instruction adapts the model in JI 905 to a charge of second degree reckless homicide. See the Comment to Wis JI-Criminal 1060for a discussion of the history and application of second degree reckless homicide as defined in § 940.06.

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1. The Committee has concluded that the simple "substantial factor" definition of cause should be sufficient for most cases. Where there is evidence of more than one possible cause, something like the following might be added immediately preceding the sentence in the instruction beginning with "before":

> There may be more than one cause of death. The act of one person alone might produce it, or the acts of two or more persons might jointly produce it.

Also see, Wis JI-Criminal 901 Cause.

2. "Criminal recklessness" is defined as follows in § 939.24(1):

> . . . 'criminal recklessness' means that the actor creates an unreasonable and substantial risk of death or great bodily harm to another human being and the actor is aware of that risk.

The Judicial Council Note to § 939.24, 1987 Senate Bill 191, explains that "[r]ecklessness requires both the creation of an objectively unreasonable and substantial risk of human death or great bodily harm and the actor's subjective awareness of that risk."

3. The statutory definition of "recklessness" clarifies that subjective awareness of the risk is required. That raises the possibility that intoxication could, as a factual matter, negate awareness of the risk. For that reason, the original definition of recklessness provided that if voluntary intoxication prevented the actor from being aware of the risk, it was not a defense if the actor would have been aware of the risk if not intoxicated. This rule was set forth in § 939.24(3):

> (3) A voluntarily produced intoxicated or drugged condition is not a defense to liability for criminal recklessness if, had the actor not been in that condition, he or she would have been aware of creating an unreasonable and substantial risk of death or great bodily harm to another human being.
>
> The Judicial Council Note to subsection (3) explains it as follows:
>
> Subsection (3) continues the present rule that a voluntarily produced intoxicated or drugged condition is not a defense to liability for criminal recklessness. Ameen v. State, 51 Wis.2d 175, 185, 186 N.W.2d 206 (1971). Patterned on s. 2.08 of the model penal code, it premises liability on whether the actor would have been aware if not in such condition of the risk of death or great bodily harm. The commentaries to s. 2.08, model penal code, state the rationale of this rule in extended fashion.

Note to § 939.24(3), 1987 Senate Bill 191.

Section 939.42, the statute codifying both voluntary and involuntary intoxication defenses, was revised by 2013 Wisconsin Act 307 [effective date: April 18, 2014]. Reference to voluntary intoxication was eliminated; as amended, the statute refers only to involuntary intoxication. Act 307 also repealed former sub. (3) of § 939.24, thus getting rid of the special rule excluding voluntary intoxication as a defense to the "aware of the risk" element of criminal recklessness. For cases arising before the effective date of Act 307, the suggestion included in the previous version of the Comment would still apply: "In a case where there is evidence of intoxication, it may be helpful to advise the jury of the rule provided in subsection (3). The Committee concluded that simply reading the statute is the best way to provide the necessary information."

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4. State v. Williquette, 129 Wis.2d 239, 251-253, 255-266, 385 N.W.2d 145 (1986).

The existence of a legal duty is the necessary predicate for omission liability. It is likely that a trial court may be requested to make a pretrial ruling whether a legal duty exists based on the facts of the case. If the court concludes that alleged facts, if proved, would support the existence of a legal duty, the case could proceed to trial, where the state will have to prove that the alleged facts exist.

The source of the legal duty must be found in state law. Williquette recognized the common law duty of a parent to protect children from harm. State v. Neumann, 2013 WI 58, ¶104, 348 Wis.2d 455, 832 N.W.2d 560, recognized the duty of a parent to provide medical care to children, basing that duty in part on Williquette, ¶¶105-109, and in part on the fact that "the statute books are replete with provisions imposing responsibility on parents for the care of their children, including the requirement that they provide medical care when necessary." ¶102.

Beyond the situations addressed in Neumann and Williquette there is little direct authority in Wisconsin defining legal duties to act. A leading commentator lists the following potential sources:

1) duty based on relationship – parent/child; husband/wife; ship captain/crew
2) duty based on statute (other than the criminal statute whose violation is in question
3) duty based on contract
4) duty based on voluntary assumption of care
5) duty based on creation of the peril
6) duty to control the conduct of others
7) duty of landowner

Wayne R. LaFave, Substantive Criminal Law [2d ed.], Sec. 6.2(a).

5. Here, the duty should be identified in general terms. The specific aspects of the duty will be at issue with the fourth requirement: that the defendant failed to act as the duty requires.

6. In State v. Williquette, supra, the court referred to a requirement that the defendant "knowingly act in disregard of the facts giving rise to the duty." 129 Wis.2d 239, 256. Also see State v. Cornellier where the court found the complaint was sufficient in alleging facts tending to show that the defendant knew of the dangerous conditions that led to a fatal explosion in his fireworks factory. 144 Wis.2d 745, 761, 425 N.W.2d 21 (Ct. App. 1988).

7. See State v.Williquette, supra, 129 Wis.2d 239, 251 (quoting LaFave and Scott, Criminal Law, sec. 2.6).

8. Relying on omission liability substitutes the failure to act for the affirmative act usually required by an offense definition. Therefore, the components of omission liability need to be connected the offense definition for the crime charged. This will often relate to the cause element required by the offense definition. For crimes involving criminal recklessness, the Committee concluded that it is best to connect the requirements for omission liability with the definition of "criminal recklessness."

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1061 SECOND DEGREE RECKLESS HOMICIDE OF AN UNBORN CHILD — § 940.06(2)

Statutory Definition of the Crime

Second degree reckless homicide, as defined in § 940.06(2) of the Criminal Code of Wisconsin, is committed by one who recklessly causes the death of an unborn child.

State's Burden of Proof

Before you may find the defendant guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following two elements were present.

Elements of the Crime that the State Must Prove

1. The defendant caused the death of an unborn child.

   "Cause" means that the defendant's act was a substantial factor in producing the death of the unborn child.[1]

   "Unborn child" means any individual of the human species from fertilization until birth that is gestating inside a woman.[2]

2. The defendant caused the death by criminally reckless conduct.

   "Criminally reckless conduct" means:

   - the conduct created a risk of death or great bodily harm to [an unborn child] [(or) to the woman who is pregnant with the unborn child] [(or) to another]; and
   - the risk of death or great bodily harm was unreasonable and substantial; and
   - the defendant was aware that (his) (her) conduct created the unreasonable and substantial risk of death or great bodily harm.[3]

Jury's Decision

If you are satisfied beyond a reasonable doubt that the defendant caused the death of an unborn child by criminally reckless conduct, you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.

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COMMENT

Wis JI-Criminal 1061 was originally published in 1999. This revision was approved by the Committee in April 2005 and included adoption of a new format.

This instruction is drafted for the offense defined in § 940.06(2), which was created by 1997 Wisconsin Act 295 [effective date: July 1, 1998]. The act revised all the general homicide statutes to apply to causing the death of an unborn child; several nonhomicide statutes were similarly revised.

Section 939.75, also created by Act 295, defines "unborn child" and sets forth several exceptions to the applicability of the revised statutes. Subsection (2)(b) recognizes the following exceptions:

- induced abortions [subd. 1.]
- acts committed in accordance with usual and customary standards of medical practice during diagnostic testing or therapeutic treatment by a licensed physician [sub. 2.]
- an act by a health care provider that is in accordance with a pregnant woman's power of attorney for health care, etc. [subd. 2h.]
- an act by a woman who is pregnant with an unborn child [subd. 3.]
- the lawful prescription, dispensation or administration, and the use by a woman of, any medicine, drug or device that is used as a method of birth control or is intended to prevent pregnancy. [subd. 4]

Subsection (3) provides that if any of these exceptions are "placed in issue by the trial evidence, the state must prove beyond a reasonable doubt that the facts constituting the exception do not exist. . . ." Thus, these exceptions are to be handled in the same manner as, for example, the mitigating circumstance of adequate provocation in cases of intentional homicide: once supported by some evidence, the absence of the exception becomes a fact the state must prove. The Committee decided not to draft instructions for the absence of these exceptions because it appeared to the Committee that their applicability would most likely be determined before charges were filed or at least before trial. Further, in cases involving reckless homicide, most of the exceptions might better be handled as relevant to the elements of the crime. That is, actions taken in accordance with customary standards of medical practice, for example, tend to show that the circumstances do not show utter disregard for life and that the conduct does not create an unreasonable risk of harm. However, § 939.75(3) is unequivocal on this point: if an exception is raised by the evidence at trial, "the state must prove beyond a reasonable doubt that the facts constituting the exception do not exist. . . ."

1. If a more extensive definition of "cause" is necessary, see Wis JI-Criminal 901.

2. This is the definition provided in § 939.75(1).

3. This is based on the definition of "criminal recklessness" provided in § 939.24(1) as amended by 1997 Wisconsin Act 295. It is broken into parts to emphasize the separate characteristics of "criminal recklessness."

In the context of this offense, the Committee concluded that the requirement that the defendant be "aware of that risk" means the following. If the conduct creates a substantial risk of death or great bodily harm only because the victim is pregnant, the defendant must be aware that the victim is pregnant. If the conduct creates a substantial risk of death or great bodily harm regardless of the victim being pregnant, the

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defendant need not be aware that the victim is pregnant. To put it another way: the defendant must be aware that the conduct creates a substantial risk of death or great bodily harm; if that level of risk exists only because the victim is pregnant, the defendant must be aware that the victim is pregnant.

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1070 ATTEMPTED FIRST DEGREE INTENTIONAL HOMICIDE — §§ 939.32, 940.01(1)(a)

The defendant is charged with attempted first degree intentional homicide.

Statutory Definition of the Crime

The crime of attempted first degree intentional homicide, as defined in § 939.32 and § 940.01 of the Criminal Code of Wisconsin, is committed by one who, with intent to commit first degree intentional homicide, does acts toward the commission of that crime which demonstrate unequivocally, under all of the circumstances, that he or she had formed that intent and would commit the crime except for the intervention of another person or some other extraneous factor.

State's Burden of Proof

Before you may find the defendant guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following two elements were present.

Elements of the Crime That the State Must Prove

1. The defendant intended to kill (name of victim).

   "Intent to kill" means that the defendant had the mental purpose to take the life of another human being or was aware that (his) (her) conduct was practically certain to cause the death of another human being.

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2. The defendant did acts toward the commission of the crime of (name intended crime) which demonstrate unequivocally, under all of the circumstances, that the defendant intended to kill and would have killed (name of victim) except for the intervention of another person or some other extraneous factor.

Meaning of "Unequivocally"

"Unequivocally" means that no other inference or conclusion can reasonably and fairly be drawn from the defendant's acts, under the circumstances.

Meaning of "Another Person"

"Another person" means anyone but the defendant and may include the intended victim.

Meaning of "Extraneous Factor"

An "extraneous factor" is something outside the knowledge of the defendant or outside the defendant's control.

When May Intent Exist?

While the law requires that the defendant acted with intent to kill, it does not require that the intent exist for any particular length of time before the act is committed. The act need not be brooded over, considered, or reflected upon for a week, a day, an hour, or even for a minute. There need not be any appreciable time between the formation of the intent and the act. The intent to kill may be formed at any time before the act, including the instant before the act, and must continue to exist at the time of the act.

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Deciding About Intent

You cannot look into a person's mind to find intent. Intent to kill must be found, if found at all, from the defendant's acts, words, and statements, if any, and from all the facts and circumstances in this case bearing upon intent.

Intent and Motive

Intent should not be confused with motive. While proof of intent is necessary to a conviction, proof of motive is not. "Motive" refers to a person's reason for doing something. While motive may be shown as a circumstance to aid in establishing the guilt of a defendant, the State is not required to prove motive on the part of a defendant in order to convict. Evidence of motive does not by itself establish guilt. You should give it the weight you believe it deserves under all of the circumstances.

Jury's Decision

If you are satisfied beyond a reasonable doubt that the defendant intended to kill (name of victim) and that the defendant's acts demonstrated unequivocally that the defendant intended to kill and would have killed (name of victim) except for the intervention of another person or some other extraneous factor, you should find the defendant guilty of attempted first degree intentional homicide.

If you are not so satisfied, you must find the defendant not guilty.

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COMMENT

Wis JI-Criminal 1070 was originally published in 1990. This revision was approved by the Committee in December 2000 and involved adoption of a new format and nonsubstantive changes to the text.

This instruction combines the general attempt instruction, Wis JI-Criminal 580, with the instruction for first degree intentional homicide, Wis JI-Criminal 1010. See the footnotes to those instructions for explanations of definitions, etc.

Several adaptations of the general approach recommended by Wis JI-Criminal 580 were possible, which shortened the instruction. Only one element of first degree intentional homicide carries over to the attempt: intent to kill. For a discussion of the law of attempt generally, see the Comment to Wis JI-Criminal 580. For explanation of the Committee's approach to instructing on first degree intentional homicide, see the Comment to Wis JI-Criminal 1010.

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1072 ATTEMPTED FIRST DEGREE INTENTIONAL HOMICIDE: SELF-DEFENSE: ATTEMPTED SECOND DEGREE INTENTIONAL HOMICIDE — § 940.01(2)(b); § 940.05[1]; § 939.32

Crimes To Consider

The defendant in this case is charged with attempted first degree intentional homicide, and you must first consider whether the defendant is guilty of that offense. If you are not satisfied that the defendant is guilty of attempted first degree intentional homicide, you must consider whether or not the defendant is guilty of attempted second degree intentional homicide which is a less serious degree of criminal homicide.

Intentional Homicide

The crimes referred to as attempted first and second degree intentional homicide are different degrees of homicide. Homicide is the taking of the life of another human being. The degree of attempted homicide defined by the law depends on the facts and circumstances of each particular case.

While the law separates attempted intentional homicides into two degrees, there are certain elements which are common to each crime. Both attempted first and second degree intentional homicide require that:

- the defendant intended to kill another person; and
- the defendant did acts toward the commission of that crime which indicate unequivocally, under all the circumstances, that (he) (she) had formed that intent and would have caused the death of _(name of victim)_ except for the intervention of another person or some other extraneous factor.

It will also be important for you to consider the privilege of self-defense in deciding which crime, if any, the defendant has committed.

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Self-Defense

The Criminal Code of Wisconsin provides that a person is privileged to intentionally use force against another under the following circumstances:

- force is used for the purpose of preventing or terminating what the person reasonably believes to be an unlawful interference with (his) (her) person by the other person; and,
- the person uses only the amount of force that (he) (she) reasonably believes is necessary to prevent or terminate the interference; and,
- the person may not intentionally use force which is intended or likely to cause death unless (he) (she) reasonably believes that such force is necessary to prevent imminent death or great bodily harm to (himself) (herself).[2]

If you find that the elements of attempted first or second degree intentional homicide have been proved in this case, the effect of the law of self-defense is as follows:

- The defendant is not guilty of either attempted first or second degree intentional homicide if the defendant:

  (1) reasonably believed that (he) (she) was preventing or terminating an unlawful interference with (his) (her) person, and

  (2) reasonably believed the force used was necessary to prevent imminent death or great bodily harm to (himself) (herself).[3]
- The defendant is guilty of attempted second degree intentional homicide if the defendant actually believed the force used was necessary to prevent imminent death or great bodily harm to (himself) (herself), but the belief or the amount of force used was unreasonable.[4]

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- The defendant is guilty of attempted first degree intentional homicide if the defendant did not actually believe the force used was necessary to prevent imminent death or great bodily harm to (himself) (herself).[5]

Because the law provides that it is the State's burden to prove all the facts necessary to constitute a crime beyond a reasonable doubt, you will not be asked to make a separate finding on whether the defendant acted in self-defense. Instead, you will be asked to determine whether the State has established the necessary facts to justify a finding of guilty for attempted first or second degree intentional homicide. If the State does not satisfy you that those facts are established by the evidence, you will be instructed to find the defendant not guilty.

The elements of each crime will now be defined for you in greater detail.

Attempted First Degree Intentional Homicide

Before you may find the defendant guilty of attempted first degree intentional homicide, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following three elements were present.

Elements of Attempted First Degree Intentional Homicide That the State Must Prove

1. The defendant intended to kill (name of victim).

   "Intent to kill" means that the defendant had the mental purpose to take the life of another human being or was aware that (his) (her) conduct was practically certain to cause the death of another human being.[6]

2. The defendant did acts which demonstrate unequivocally, under all the circumstances, that (he)(she) had formed that intent and would have caused the death of (name of victim) except for the intervention of another person or some other extraneous factor.[7]

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"Unequivocally" means that no other inference or conclusion can reasonably and fairly be drawn from the defendant's acts, under the circumstances.

"Another person" means anyone but the defendant and may include the intended victim.

An "extraneous factor" is something outside the knowledge of the defendant or outside the defendant's control.

3. The defendant did not actually believe that the force used was necessary to prevent imminent death or great bodily harm to himself.[8]

When May Intent Exist?

While the law requires that the defendant acted with intent to kill, it does not require that the intent exist for any particular length of time before the act is committed. The act need not be brooded over, considered, or reflected upon for a week, a day, an hour, or even for a minute. There need not be any appreciable time between the formation of the intent and the act. The intent to kill may be formed at any time before the act, including the instant before the act, and must continue to exist at the time of the act.

Deciding About Intent

You cannot look into a person's mind to find intent. Intent to kill must be found, if found at all, from the defendant's acts, words, and statements, if any, and from all the facts and circumstances in this case bearing upon intent.[9]

Intent and Motive

Intent should not be confused with motive. While proof of intent is necessary to a conviction, proof of motive is not. "Motive" refers to a person's reason for doing something. While motive may be shown as a circumstance to aid in establishing the guilt of a defendant, the State is not required to prove motive on the part of a defendant in order to convict.

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Evidence of motive does not by itself establish guilt. You should give it the weight you believe it deserves under all of the circumstances.

Actual Belief That The Force Used Was Necessary

The third element of attempted first degree intentional homicide requires that the defendant did not actually believe the force used was necessary to prevent imminent death or great bodily harm to (himself) (herself). This requires the State to prove[10] either:

1) that the defendant did not actually believe (he) (she) was in imminent danger of death or great bodily harm; or

2) that the defendant did not actually believe the force used was necessary to prevent imminent danger of death or great bodily harm to (himself) (herself).

When attempted first degree intentional homicide is considered, the reasonableness of the defendant's belief is not an issue. You are to be concerned only with what the defendant actually believed. Whether these beliefs are reasonable is important only if you later consider whether the defendant is guilty of attempted second degree intentional homicide.[11]

Jury's Decision

If you are satisfied beyond a reasonable doubt that the defendant intended to kill (name of victim), and that the defendant's acts demonstrated unequivocally that the defendant intended to kill and would have killed (name of victim) except for the intervention of another person or some other extraneous factor, and that the defendant did not actually believe that the force used was necessary to prevent imminent death or great bodily harm to (himself) (herself), you should find the defendant guilty of attempted first degree intentional homicide.

If you are not so satisfied, you must not find the defendant guilty[12] of attempted first degree intentional homicide, and you must consider whether the defendant is guilty of

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attempted second degree intentional homicide, as defined in § 940.05 of the Criminal Code of Wisconsin, which is a lesser included offense of attempted first degree intentional homicide.

Make Every Reasonable Effort To Agree

You should make every reasonable effort to agree unanimously on the charge of attempted first degree intentional homicide before considering the offense of attempted second degree intentional homicide.[13] However, if after full and complete consideration of the evidence, you conclude that further deliberation would not result in unanimous agreement on the charge of attempted first degree intentional homicide, you should consider whether the defendant is guilty of attempted second degree intentional homicide.

Attempted Second Degree Intentional Homicide

Before you may find the defendant guilty of attempted second degree intentional homicide, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following three elements were present.

Elements of Attempted Second Degree Intentional Homicide That the State Must Prove

1. The defendant intended to kill (name of victim).
2. The defendant did acts which demonstrate unequivocally, under all the circumstances, that (he)(she) had formed that intent and would have caused the death of (name of victim) except for the intervention of another person or some other extraneous factor.
3. The defendant did not reasonably believe that (he) (she) was preventing or terminating an unlawful interference with (his) (her) person or did not reasonably believe that the force used was necessary to prevent imminent death or great bodily harm to (himself) (herself).[14]

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You have already been instructed on the definitions of "intent to kill," "unequivocally," "another person," and "extraneous factor." The same definitions apply to your consideration of attempted second degree intentional homicide.

Reasonable Belief That The Force Used Was Necessary

The third element of attempted second degree intentional homicide requires that the defendant did not reasonably believe that (he) (she) was preventing or terminating an unlawful interference with (his) (her) person or did not reasonably believe the force used was necessary to prevent imminent death or great bodily harm to (himself) (herself). This requires that the State prove any one of the following:[15]

1) that a reasonable person in the circumstances of the defendant would not have believed that (he) (she) was preventing or terminating an unlawful interference with (his) (her) person; or

2) that a reasonable person in the circumstances of the defendant would not have believed (he) (she) was in danger of imminent death or great bodily harm; or

3) that a reasonable person in the circumstances of the defendant would not have believed that the amount of force used was necessary to prevent imminent death or great bodily harm to (himself) (herself).

The reasonableness of the defendant's belief must be determined from the standpoint of the defendant at the time of (his) (her) acts and not from the viewpoint of the jury now. The standard is what a person of ordinary intelligence and prudence would have believed in the position of the defendant under the circumstances existing at the time of the alleged offense.

Jury's Decision

If you are satisfied beyond a reasonable doubt that the defendant intended to kill (name of victim), and that the defendant's acts demonstrated unequivocally that the defendant

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intended to kill and would have killed _(name of victim)_ except for the intervention of another person or some other extraneous factor, and that the defendant did not reasonably believe that (he) (she) was preventing or terminating an unlawful interference with (his) (her) person or did not reasonably believe the force used was necessary to prevent imminent death or great bodily harm to (himself) (herself), you should find the defendant guilty of attempted second degree intentional homicide.

If you are not satisfied beyond a reasonable doubt that the defendant is guilty of attempted second degree intentional homicide, you must find the defendant not guilty.

You are not, in any event, to find the defendant guilty of more than one of the foregoing offenses.

COMMENT

Wis JI-Criminal 1072 was approved by the Committee in February 2005.

This instruction combines Wis JI-Criminal 1014 and 1070 to address the following situation:

- attempted first degree intentional homicide under §§ 939.32 and 940.01 is charged;
- attempted second degree intentional homicide based on unnecessary defensive force under §§ 939.32 and 940.05 is submitted as a lesser included offense; and,
- there is evidence of the complete privilege of self-defense in the case.

The Committee concluded that the same substantive standards and procedures apply to attempt cases as apply to cases involving completed crimes. The substantive standards for completed homicides involving claims of self-defense are set forth in State v. Head, 2002 WI 99, 255 Wis.2d 194, 648 N.W.2d 413, which is discussed extensively in the notes to Wis JI-Criminal 1014.

When there is evidence of the complete privilege of self-defense, there will always be a sufficient evidentiary basis for instructing on "unnecessary defensive force" – what was called "imperfect self-defense" under pre-1989 Wisconsin law. If the jury is instructed on the complete privilege, "an independent analysis of the property of imperfect self-defense as a lesser included offense is not required." State v. Gomaz, 141 Wis.2d 302, 309, 414 N.W.2d 626 (1987), citing Ross v. State, 61 Wis.2d 160, 211 N.W.2d 827 (1973).

1. This instruction is for a case where attempted first degree intentional homicide is charged, there is evidence that the defendant acted in self-defense, and the lesser included offense of attempted second degree intentional homicide is to be submitted to the jury. The same substantive standards and procedural approach used for the completed crime are used here. Compare Wis JI-Criminal 1014.

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2. These statements are based on the definition of the privilege of self-defense found in § 939.48.

3. The effect of the privilege of self-defense in a case where attempted first degree intentional homicide is charged is the same as for the competed crime and is as follows:

(a) if the exercise of the privilege was reasonable, both in inception and scope, the defendant is not guilty of any crime;

(b) if the defendant actually believed it was necessary to use force in self defense, but acts unreasonably, the defendant is guilty of attempted second degree intentional homicide. He or she may act unreasonably in either of two ways:

i) the belief that it was necessary to act in self-defense may be unreasonable; or

ii) the amount of force used may be unreasonable

(c) if the defendant did not actually believe it was necessary to use force in self defense, the defendant is guilty of attempted first degree intentional homicide.

4. Section 940.01(2)(b) provides that causing the death by "unnecessary defensive force" mitigates what would otherwise be first degree intentional homicide to second degree intentional homicide: "Death was caused because the actor believed he or she or another was in imminent danger of death or great bodily harm and that the force used was necessary to defend the endangered person, if either belief was unreasonable." The same standard applies to attempts.

5. As with the completed crime, the absence of the mitigating circumstance — no actual belief that the force used was necessary to prevent imminent death or great bodily harm — becomes a fact necessary to constitute the attempted first degree offense. As to the completed crime, see § 940.01(3) and State v. Head, 2002 WI 99, 255 Wis.2d 194, 648 N.W.2d 413. See notes 14 and 15, below, and note 5, Wis JI-Criminal 1014.

6. The phrase "or aware that his conduct is practically certain to cause that result" was added to the definition of "with intent to" found in § 939.23 by the 1988 revision of the homicide statutes. Further, the revision applied the § 939.23 definition to homicide offenses. Under prior law, "with intent to kill" was defined solely in terms of mental purpose for offenses in Chapter 940. See the discussion in Wis JI-Criminal 1000 and 923B.

7. The statement of the facts necessary to constitute an "attempt" and the definitions of the relevant terms are based on those used in the standard attempt instruction. See Wis JI-Criminal 580. Also see Wis JI-Criminal 1070, Attempted First Degree Intentional Homicide.

8. See note 5, supra.

9. This is the shorter version used to describe the process of finding intent. The Committee has concluded that it is suitable for use in most cases. For the longer description of the intent-finding process, see Wis JI-Criminal 923A.

10. Section 940.01(2) recognizes four circumstances as affirmative defenses which mitigate first degree intentional homicide to second degree intentional homicide. The same standards apply to attempt cases.

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When the existence of an affirmative defense "has been placed in issue by the trial evidence, the state must prove beyond a reasonable doubt that the facts constituting the defense did not exist in order to sustain a finding of guilt" for a violation of § 940.01. See § 940.01(3). This statute codifies prior Wisconsin law which had established that when evidence of a defense is in the case, the absence of that defense becomes a fact the state must prove to establish guilt for the crime charged. Moes v. State, 91 Wis.2d 756, 284 N.W.2d 66 (1979).

A defense is "placed in issue" when "a reasonable view of the evidence could support a jury finding that the state has not borne its burden of disproving beyond a reasonable doubt the facts constituting the defense." Judicial Council Note to § 940.01, 1987 Senate Bill 191, citing State v. Felton, 110 Wis.2d 485, 508, 329 N.W.2d 161 (1983).

Two beliefs must be held by the defendant in order to mitigate attempted first degree intentional homicide on the basis of "unnecessary defensive force": a belief that the defendant (or another) was in imminent danger of death or great bodily harm; and a belief that the force used was necessary to defend against that danger. See § 940.01(2)(b). By proving that the defendant did not actually hold either one of these beliefs, the state may meet its burden of proving that "the facts constituting the defense did not exist." Section 940.01(3).

11. The statement of the alternative ways of satisfying this element is the same as that used in Wis JI-Criminal 1014. The 2002 revision of that instruction changed the element in response to the decision in State v. Head, 2002 WI 99, 255 Wis.2d 194, 648 N.W.2d 413. Head modified State v. Camacho, 176 Wis.2d 860, 501 N.W.2d 380 (1993), by holding that there is no "objective threshold" for invoking the mitigating factor of "unnecessary defensive force." The "objective threshold" refers to a requirement that the defendant reasonably believe that he or she was preventing or terminating an unlawful interference. Head holds that it is sufficient for purposes of "unnecessary defensive force" that a defendant actually believe that the defensive force used was necessary. See note 13, Wis JI-Criminal 1014.

12. The instruction refers to "you must not find the defendant guilty . . ." rather than the typical "you must find the defendant not guilty . . ." in making the transition to consideration of the lesser included offense. This is to reflect the common practice of giving the jury only one not guilty verdict, along with guilty verdicts for the charged crime and the lesser included crime. Under that practice, the jury would not make a specific finding of "not guilty" on the charged crime – here, attempted first degree intentional homicide.

Thus, the jury would proceed to consider the lesser – here, attempted second degree intentional homicide – under two circumstances: 1) the jury unanimously agrees that the defendant is not guilty of attempted first degree intentional homicide; or , 2) the jury is unable to reach unanimous agreement on that charge. The next paragraph in the instruction addresses the latter situation.

13. This paragraph builds in part of the transitional material usually used between the charged crime and the lesser included offense. See Wis JI-Criminal 112.

14. As with the completed crime, the absence of the complete privilege of self-defense is a fact necessary to constitute the offense of attempted second degree intentional homicide, assuming there is evidence of the complete privilege in the case. Since there already has been a finding of "some evidence" of the imperfect privilege, (now called "unnecessary defensive force"), there will almost always be a basis for submitting the existence of the complete privilege to the jury. As to completed crimes, see State v.

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Gomaz, 141 Wis.2d 302, 310, 414 N.W.2d 626 (1987), recognizing that the two comparable offenses under prior law "differ only in regard to the factual determination of 'reasonableness.'" Also see note 15, Wis JI-Criminal 1014.

15. The exercise of the privilege may be proved to be unreasonable in any one of three ways: by showing that the defendant's belief that he or she was preventing or terminating an unlawful interference was unreasonable; or, by showing that the defendant's belief that he or she was in danger of imminent death or great bodily harm was unreasonable; or, by showing that the amount of force used was unreasonable. See note 14, supra, and note 15, Wis JI-Criminal 1014.

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1100 HOMICIDE INSTRUCTIONS REPLACED FOR OFFENSES COMMITTED ON OR AFTER JANUARY 1, 1989

[WITHDRAWN]

COMMENT

Wis JI-Criminal 1100 was originally published in 1989. Its withdrawal was approved by the Committee in April 2006.

Wis JI-Criminal 1100 listed the instructions for homicide offenses that were replaced by new or revised instructions reflecting revisions made by 1987 Wisconsin Act 399. Because the "new" homicide law has been in effect for over 15 years, the Committee concluded that Wis JI-Criminal 1100 was no longer needed.

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1125 ABORTION [FETICIDE][1] — § 940.04(1)

CAUTION: IT IS GENERALLY CONCEDED THAT THE WISCONSIN CRIMINAL ABORTION STATUTE, § 940.04, IS UNCONSTITUTIONAL AS APPLIED TO MEDICAL PROCEDURES CONDUCTED WITH CONSENT.[2]

Statutory Definition of the Crime

Section 940.04(1) of the Criminal Code is violated by one, other than the mother, who intentionally destroys the life of an unborn child.

State's Burden of Proof

Before you may find the defendant guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following two elements were present.

Elements of the Crime That the State Must Prove

1. (Name of mother) was pregnant with a living unborn child.

   The term "unborn child" means a human being from the time of conception until it is born alive.[3]

2. The defendant intentionally destroyed the life of the unborn child.[4]

Meaning of "Intentionally"

The term "intentionally" means that the defendant either had the purpose to destroy the life of an unborn child, or was aware that (his) (her) conduct was practically certain to cause that result.[5] In addition, the defendant must have known that the unborn child was living at the time of the act claimed by the State to have destroyed the life of the child.[6]

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Deciding About Intent

You cannot look into a person's mind to find out intent. Intent must be found, if found at all, from the defendant's acts, words, ands statements, if any, and from all the facts and circumstances in this case bearing upon intent.

Jury's Decision

If you are satisfied beyond a reasonable doubt that both elements of this offense have been proved, you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.

COMMENT

Wis JI-Criminal 1125 was originally published in 1966 and revised in 1977 and 1985. The 1985 revision responded to the decision in State v. Black, see discussion below. This revision was approved by the Committee in April 2006 and involved adoption of a new format and nonsubstantive changes to the text.

1. The term "feticide" was used in State v. Black, 188 Wis.2d 639, 643-44, 526 N.W.2d 132 (1994):

> This is not an abortion case in the sense of Roe v. Wade. That is, this is not a case about a woman's right to terminate her pregnancy. This is not a case about a physician's right to perform the medical procedure of abortion. Further, this is not a case about when an unborn child "quickens" or becomes "viable."
>
> This is a case about feticide.

Black is discussed in note 2, below.

2. It is generally conceded that § 940.04 is unconstitutional as applied to abortions performed by medical personnel with the consent of the mother of the child. See Babbitz v. McCann, 310 F. Supp. 293 (E.D. Wis. 1970), Larkin v. McCann, 368 F. Supp. 1352 (E.D. Wis. 1974), and Roe v. Wade, 410 U.S. 113 (1973). However, in State v. Black, 188 Wis.2d 639, 526 N.W.2d 132 (1994), the Wisconsin Supreme Court held that § 940.04(2)(a) could be constitutionally applied to a man who "allegedly caused the death of an unborn quick child . . . by violently assaulting the unborn child's mother." 188 Wis.2d 639, 646. The court held that:

> . . . concerns . . . that sec. 940.04(2)(a) could be used against a woman or her physician (in the context of performing an abortion) are unfounded. Section 940.04(2)(a) cannot be used to charge

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for a consensual abortive type of procedure. By its own terms it cannot apply to a mother. See also sec. 940.13 (abortion statutes cannot be enforced against any woman who obtains an abortion). Any attempt to apply sec. 940.04(2)(a) to a physician performing a consensual abortion prior to viability would be unconstitutional under Roe v. Wade. Further, any attempt to apply it to a physician performing a consensual abortion after viability would be inconsistent with the newer sec. 940.15 which limits such action and establishes penalties for it.

188 Wis.2d 639, 646.

Black addressed a charge under subsec. (2)(a) of § 940.04. This instruction is drafted for violations of sub. (1). The only difference between the two subsections is that sub. (2)(a) applies a more serious penalty where the defendant destroys the life of an unborn "quick" child.

3. This is the definition provided in § 940.04(6).

4. The previous version of this instruction included the following at this point:

If you are satisfied beyond a reasonable doubt that the unborn child was alive at a particular time, you may infer that it was alive at the time of the act of the defendant unless there is evidence tending to show that the child was dead at such time.

The Committee believes this is an accurate explanation of the reasoning process and may be included in the instruction if supported by the evidence. An instruction in equivalent terms was approved in Holt v. State, 17 Wis.2d 468, 481, 117 N.W.2d 626 (1962).

5. See § 939.23(3) and Wis JI-Criminal 923A and 923B.

6. The knowledge requirement is based on § 939.23(3) which provides that the use of "intentionally" in a criminal requires "knowledge of those facts which are necessary to make [the] conduct criminal and which are set forth after the word 'intentionally.'"

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1170 HOMICIDE BY NEGLIGENT OPERATION OF A VEHICLE — § 940.10

Statutory Definition of the Crime

Homicide by negligent operation of a vehicle, as defined in § 940.10 of the Criminal Code of Wisconsin, is committed by one who causes the death of another human being by the negligent operation or handling of a vehicle.

State's Burden of Proof

Before you may find the defendant guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following three elements were present.

Elements of the Crime That the State Must Prove

1. The defendant operated[1] a vehicle.[2]
2. The defendant operated a vehicle in a manner constituting criminal negligence.
3. The defendant's criminal negligence caused the death of (name of victim).

"Cause" means that the defendant's act was a substantial factor in producing the death.[3]

The Meaning of "Criminal Negligence"

"Criminal negligence" means:[4]

- the defendant's operation of a vehicle created a risk of death or great bodily harm; and
- the risk of death or great bodily harm was unreasonable and substantial; and

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- the defendant should have been aware that (his) (her) operation of a vehicle created the unreasonable and substantial risk of death or great bodily harm.

IF REFERENCE TO ORDINARY NEGLIGENCE IS BELIEVED TO BE HELPFUL OR NECESSARY SEE WIS JI-CRIMINAL 925.[5]

IF EVIDENCE OF VIOLATION OF A SAFETY STATUTE HAS BEEN RECEIVED, ADD THE FOLLOWING:[6]

[Evidence has been received that the defendant violated section _____ of the Wisconsin Statutes, which provides that (summarize the statute). Violating this statute does not necessarily constitute criminal negligence. You may consider this along with all the other evidence in determining whether the defendant's conduct constituted criminal negligence.]

Jury's Decision

If you are satisfied beyond a reasonable doubt that all three elements of this offense have been proved, you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.

COMMENT

Wis JI-Criminal 1170 was originally published in 1966 and revised in 1983, 1984, 1986, and 1989. This revision was approved by the Committee in March 2002 and involved adoption of a new format and nonsubstantive changes to the text.

This instruction is for violations of § 940.10, created by 1987 Wisconsin Act 399 as part of the revision of the homicide statutes. The statute applies to offenses committed on or after January 1, 1989. For a discussion of the homicide revision generally, and of the offense covered by this instruction, see the Introductory Comment at Wis JI-Criminal 1000.

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This offense was formerly covered by § 940.08. The homicide revision changed former § 940.08 by removing "vehicle" as one of the instrumentalities, creating a new statute, § 940.10, to cover homicide by negligent operation of a vehicle.

1. Though the statute refers to "operation or handling" of a vehicle, the instruction uses "operate" throughout.

The Criminal Code does not define "operate." If a definition is needed, the one provided in § 346.63(3)(b) may be appropriate: "Operate means the physical manipulation or activation of any of the controls of a motor vehicle necessary to put in motion." See Milwaukee County v. Proegler, 95 Wis.2d 614, 291 N.W.2d 608 (Ct. App. 1980), which interprets § 346.63(3)(b). Also see Milwaukee v. Richards, 269 Wis. 570, 69 N.W.2d 445 (1955); State v. Hall, 271 Wis. 450, 73 N.W.2d 585 (1955); and Monroe County v. Kruse, 76 Wis.2d 126, 250 N.W.2d 375 (1977), which provide a definition of "operate" used before the § 346.63 definition was enacted.

Also see "What Constitutes Driving, Operating, Or Being In Control Of Motor Vehicle For Purposes Of Driving While Intoxicated Statute Or Ordinance," 93 A.L.R.3d 7 (1979).

2. If there is a question whether a device is a "vehicle," add the following which is adapted from § 939.22(44):

> "Vehicle" means any self-propelled device for moving persons or property or pulling implements from one place to another, whether such device is operated on land, rails, water, or in the air.

3. The Committee has concluded that the simple "substantial factor" definition of cause should be sufficient for most cases. Where there is evidence of more than one possible cause, something like the following might be added immediately preceding the sentence in the instruction beginning with "before":

> There may be more than one cause of death. The act of one person alone might produce it, or the acts of two or more persons might jointly produce it.

Also see, Wis JI-Criminal 901 Cause.

4. The definition of "criminal negligence" is based on the one provided in § 939.25. The Committee concluded that this definition, which highlights the three significant components of the statutory definition, is preferable to the one formerly used, which began by defining "ordinary negligence." See Wis JI-Criminal 925 for a complete discussion of the Committee's rationale for adopting this definition and for optional material that may be added if believed to be necessary.

5. Wis JI-Criminal 925 includes two additional paragraphs: one describing "ordinary negligence" and one explaining how "criminal negligence" differs.

6. The suggested instruction on the effect of violation of a safety statute is intended to comply with the decision of the Wisconsin Supreme Court in State v. Dyess, 124 Wis.2d 525, 370 N.W.2d 222 (1985). In Dyess, the court held that the following instruction violated the requirements of § 903.03 by requiring the jury to find the presumed fact (negligence) upon proof of the basic fact (speeding):

The safety statute in the motor vehicle code provides that, no person shall drive a vehicle at a

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> speed in excess, and on 14th Street in particular, of 30 miles per hour. Any speed in excess of that limit would be negligent speed regardless of other conditions. It is for you to determine whether Johrie Dyess's speed was over said limit and, if under, whether it was, nevertheless, a negligent speed under the conditions and circumstances then present and under the rules of law given to you in these instructions. (Emphasis in original.) 124 Wis.2d 525, 531.

The court said that if the directions of § 903.03 had been followed, the trial court "would have informed the jury that, if it found as a matter of fact that Dyess was exceeding the posted speed limit of 30 miles per hour, it could regard that fact as sufficient evidence of negligence to make that finding but it was not required to do so." 124 Wis.2d 525, 539.

The suggested instruction tries to implement Dyess and § 903.03 by advising the jury that it is for them to determine whether the defendant violated the statute and, if so, whether the conduct constituted negligence. Such a format should be used instead of the uniform civil instructions dealing with statutory violations. (See, e.g., Wis JI-Civil 1290.) As the court stated in Dyess: "No one in the instant case finds fault with Civil Jury Instruction No. 1290 as used in civil cases, but the authority to direct a jury in a criminal case that speed in excess of the posted limit, regardless of other conditions, is negligence, is specifically prohibited by sec. 903.03(3)." 124 Wis.2d 525, 536.

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1171 HOMICIDE OF AN UNBORN CHILD BY NEGLIGENT OPERATION OF A VEHICLE — § 940.10(2)

Statutory Definition of the Crime

Homicide by negligent operation of a vehicle, as defined in § 940.10(2) of the Criminal Code of Wisconsin, is committed by one who causes the death of an unborn child by the negligent operation or handling of a vehicle.

State's Burden of Proof

Before you may find the defendant guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following three elements were present.

Elements of the Crime that the State Must Prove

1. The defendant operated[1] a vehicle.[2]

2. The defendant operated a vehicle in a manner constituting criminal negligence.

   "Criminal negligence" means:

   - the defendant's operation of a vehicle created a risk of death or great bodily harm to [an unborn child] [(or) to the woman who is pregnant with the unborn child] [(or) to another]; and
   - the risk of death or great bodily harm was unreasonable and substantial; and
   - the defendant should have been aware that (his) (her) operation of a vehicle created the unreasonable and substantial risk of death or great bodily harm.[3]

3. The defendant's operation of the vehicle in a manner amounting to criminal negligence caused the death of an unborn child.

   "Cause" means that criminal negligence by the defendant was a substantial factor in producing the death.[4]

   "Unborn child" means any individual of the human species from fertilization until birth that is gestating inside a woman.[5]

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Jury's Decision

If you are satisfied beyond a reasonable doubt that the defendant operated a vehicle in a manner constituting criminal negligence and that the defendant's criminal negligence caused the death of an unborn child, you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.

COMMENT

Wis JI-Criminal 1171 was originally published in 1999. This revision was approved by the Committee in April 2005 and involved adoption of a new format.

This instruction is for a violation of § 940.10(2), created by 1997 Wisconsin Act 295. The penalty for violating § 940.10 is that for a Class E felony: imprisonment for not more than 2 years.

Act 295 also created sub. (2) of § 940.08, prohibiting causing the death of an unborn child by the negligent operation or handling of a dangerous weapon, explosives, or fire. A separate instruction for that offense has not been published. If one is needed, the third element of this instruction should be substituted for the third element of Wis JI-Criminal 1175.

1. Though the statute refers to "operation or handling" of a vehicle, the instruction uses "operate" throughout.

The Criminal Code does not define "operate." If a definition is needed, the one provided in § 346.63(3)(b) may be appropriate: "Operate means the physical manipulation or activation of any of the controls of a motor vehicle necessary to put in motion." See Milwaukee County v. Proegler, 95 Wis.2d 614, 291 N.W.2d 608 (Ct. App. 1980), which interprets § 346.63(3)(b). Also see Milwaukee v. Richards, 269 Wis. 570, 69 N.W.2d 445 (1955); State v. Hall, 271 Wis. 450, 73 N.W.2d 585 (1955); and Monroe County v. Kruse, 76 Wis.2d 126, 250 N.W.2d 375 (1977), which provide a definition of "operate" used before the § 346.63 definition was enacted.

Also see "What Constitutes Driving, Operating, Or Being In Control Of Motor Vehicle For Purposes Of Driving While Intoxicated Statute Or Ordinance," 93 A.L.R.3d 7 (1979).

2. If there is a question whether a device is a "vehicle," add the following which is adapted from § 939.22(44):

> "Vehicle" means any self-propelled device for moving persons or property or pulling implements from one place to another, whether such device is operated on land, rails, water, or in the air.

3. The instruction on criminal negligence is based on the one provided in § 939.25. The Committee concluded that this definition, which highlights the three significant components of the statutory definition, is preferable to the one formerly used, which began by defining "ordinary negligence." See Wis

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JI-Criminal 925 for a complete discussion of the Committee's rationale for adopting this definition and for optional material that may be added if believed to be necessary.

4. The Committee concluded that the simple "substantial factor" definition of cause should be sufficient in most cases. Where there is evidence of more than one possible cause, something like the following might be added immediately preceding the sentence in the instruction beginning with "before":

> There may be more than one cause of death. The act of one person alone might produce it, or the acts of two or more persons might jointly produce it.

Also see Wis JI-Criminal 901, Cause.

5. This is the definition of "unborn child" provided in § 939.75(1).

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1175 HOMICIDE BY NEGLIGENT HANDLING OF A DANGEROUS WEAPON — § 940.08

Statutory Definition of the Crime

Homicide by negligent operation of a dangerous weapon, as defined in § 940.08 of the Criminal Code of Wisconsin, is committed by one who causes the death of another human being by the negligent operation or handling of a dangerous weapon.

State's Burden of Proof

Before you may find the defendant guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following three elements were present.

Elements of the Crime That the State Must Prove

1. The defendant operated or handled a dangerous weapon.
2. The defendant operated or handled a dangerous weapon in a manner constituting criminal negligence.
3. The defendant's operation or handling of a dangerous weapon in a manner constituting criminal negligence caused the death of (name of victim).

   "Cause" means that the defendant's act was a substantial factor in producing the death.[1]

Meaning of "Dangerous Weapon"

"Dangerous weapon" means[2]

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[any firearm, whether loaded or unloaded. A firearm is a weapon that acts by force of gunpowder.]

[any device designed as a weapon and capable of producing death or great bodily harm. "Great bodily harm" means serious bodily injury.[3]]

[any device or instrumentality which, in the manner it is used or intended to be used, is likely to produce death or great bodily harm. "Great bodily harm" means serious bodily injury.[4]][5]

[any electric weapon. An electric weapon is a device designed or used to immobilize or incapacitate a person by the use of electric current.]

Meaning of "Criminal Negligence"

"Criminal negligence" means:[6]

- the defendant's operation or handling of a dangerous weapon created a risk of death or great bodily harm; and
- the risk of death or great bodily harm was unreasonable and substantial; and
- the defendant should have been aware that (his) (her) operation or handling of a dangerous weapon created the unreasonable and substantial risk of death or great bodily harm.

IF REFERENCE TO ORDINARY NEGLIGENCE IS BELIEVED TO BE HELPFUL OR NECESSARY SEE WIS JI-CRIMINAL 925.[7]

Jury's Decision

If you are satisfied beyond a reasonable doubt that all three elements of this offense have been proved, you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.

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COMMENT

Wis JI-Criminal 1175 was originally published in 1966 and revised in 1983, 1986, 1989, and 2006. This revision was approved by the Committee in February 2011 and involved adding reference to 2011 Wisconsin Act 2 to the Comment.

This instruction is for violations of § 940.08, which was changed by the 1989 homicide revision [1987 Wisconsin Act 399] in the following ways:

1) it removed "vehicle" as one of the instrumentalities, creating a new statute, § 940.10, to cover homicide by negligent operation of a vehicle [see Wis JI-Criminal 1170]; and,

2) it further amended the list of instrumentalities by striking "firearm, airgun, knife or bow and arrow" and replacing those terms with "dangerous weapons, explosives or fire."

As to the second change noted above, the Judicial Council Note to § 940.08 (1987 Senate Bill 191) indicates that the intent was not to eliminate any of the previously mentioned instrumentalities:

> The definition of the offense is broadened to include highly negligent handling of fire, explosives and dangerous weapons in addition to firearm, airgun, knife or bow and arrow. See s. 939.22(10), stats.

The instruction is drafted for a case involving a "dangerous weapon" and would need to be modified if "fire" or "explosives" was involved.

2011 Wisconsin Act 2 amended § 940.08 to add an exception by creating subsection (3) to read:

(3) Subsection (1) does not apply to a health care provider acting within the scope of his or her practice or employment.

"Health care provider" is defined in one other Criminal Code statute. Section 940.20(7)(a)3. provides: "'Health care provider' means any person who is licensed, registered, permitted or certified by the department of health services or the department of regulation and licensing to provide health care services in this state." Note that § 940.08 applies only to criminal negligence in the "operation or handling of a dangerous weapon, explosives, or fire . . ." It is not obvious to the Committee how the exception for health care providers would relate to the elements of this offense.

The usual practice in Wisconsin is to treat statutory exceptions like affirmative defenses: If there is some evidence of the exception, the burden is on the state to prove that the exception does not apply. See, for example, Wis JI-Criminal 1335, Carrying A Concealed Weapon, which recommends adding an element where there is a claim that the defendant was a peace officer; peace officers are subject to an exception from the ban on carrying concealed weapon in § 941.23.

1. The Committee has concluded that the simple "substantial factor" definition of cause should be sufficient for most cases. Where there is evidence of more than one possible cause, something like the following might be added immediately preceding the sentence in the instruction beginning with "before":

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> There may be more than one cause of death. The act of one person alone might produce it, or the acts of two or more persons might jointly produce it.

Also see, Wis JI-Criminal 901 Cause.

2. Choose the alternative supported by the evidence. They are based on the definition of "dangerous weapon" provided in s. 939.22(10). See Wis JI-Criminal 910 for footnotes discussing each alternative.

3. The Committee has concluded that defining great bodily harm as "serious bodily injury" is sufficient in most cases. See Wis JI-Criminal 914 for a complete discussion of that term, as defined in § 939.22(14).

4. The Committee has concluded that defining great bodily harm as "serious bodily injury" is sufficient in most cases. See Wis JI-Criminal 914 for a complete discussion of that term, as defined in § 939.22(14).

5. A potential problem in instructing on this part of the definition of dangerous weapon is illustrated by State v. Tomlinson, 2002 WI 91, 254 Wis.2d 502, 648 N.W.2d 367. Tomlinson was charged with being party to the crime of first degree reckless homicide while using a dangerous weapon. In instructing on the dangerous weapon penalty enhancer the court stated: "'Dangerous weapon' means a baseball bat." The supreme court held that the instruction was error, concluding that it created a "mandatory conclusive presumption because it requires the jury to find that Tomlinson used a 'dangerous weapon' . . . if it first finds . . . that he used a baseball bat." 2002 WI 91, ¶62.

In light of Tomlinson, the Committee concluded that the definition of "dangerous weapon" in the instructions should be revised to include all the statutory alternatives in the text of the instruction. The alternative to be used in a case like Tomlinson would be the following:

> "Dangerous weapon" means any device or instrumentality which, in the manner it is used or intended to be used, is likely to produce death or great bodily harm. "Great bodily harm" means serious bodily injury.

If instructing the jury in terms tailored to the facts of the case is believed to be desirable, a different approach for a baseball bat case might be as follows:

> The state alleges that a baseball bat was a dangerous weapon. A baseball bat may be considered to be a dangerous weapon if, in the manner it was used, it was calculated or likely to produce death or great bodily harm.

6. The definition of "criminal negligence" is based on the one provided in § 939.25. The Committee concluded that this definition, which highlights the three significant components of the statutory definition, is preferable to the one formerly used, which began by defining "ordinary negligence." See Wis JI-Criminal 925 for a complete discussion of the Committee's rationale for adopting this definition and for optional material that may be added if believed to be necessary.

7. Wis JI-Criminal 925 includes two additional paragraphs: one describing "ordinary negligence" and one explaining how "criminal negligence" differs.

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1185 HOMICIDE BY OPERATION OF A VEHICLE WHILE UNDER THE INFLUENCE — § 940.09(1)(a)

Statutory Definition of the Crime

Section 940.09(1)(a) of the Criminal Code of Wisconsin is violated by one who causes the death of another by the operation or handling of a vehicle while under the influence of an intoxicant.[1]

State's Burden of Proof

Before you may find the defendant guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following three elements were present.

Elements of the Crime That the State Must Prove

1. The defendant operated[2] a vehicle.[3]

   "Operate" means the physical manipulation or activation of any of the controls of a vehicle necessary to put it in motion.[4]

2. The defendant's operation of a vehicle caused the death of (name of victim).

   "Cause" means that the defendant's operation of a vehicle was a substantial factor[5] in producing the death.

3. The defendant was under the influence of an intoxicant at the time the defendant operated a vehicle.

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Definition of "Under the Influence of an Intoxicant"

"Under the influence of an intoxicant" means that the defendant's ability to operate a vehicle was materially impaired because of consumption of an alcoholic beverage.[6]

Not every person who has consumed alcoholic beverages is "under the influence" as that term is used here. What must be established is that the person has consumed a sufficient amount of alcohol to cause the person to be less able to exercise the clear judgment and steady hand necessary to handle and control a motor vehicle.

It is not required that impaired ability to operate be demonstrated by particular acts of unsafe driving. What is required is that the person's ability to safely control the vehicle be materially impaired.

How to Use the Test Result Evidence

The law states that the alcohol concentration in a defendant's (breath) (blood) (urine) sample taken within three hours of operating a vehicle is evidence of the defendant's alcohol concentration at the time of the operating.[7]

WHERE TEST RESULTS SHOWING MORE THAN 0.04 BUT LESS THAN 0.08 GRAMS HAVE BEEN ADMITTED, THE EVIDENCE IS RELEVANT BUT DOES NOT HAVE PRIMA FACIE EFFECT. SEE WIS JI-CRIMINAL 232.[8]

WHERE TEST RESULTS SHOWING 0.08 GRAMS OR MORE HAVE BEEN ADMITTED[9] AND THERE IS NO ISSUE RELATING TO THE DEFENDANT'S POSITION ON THE "BLOOD-ALCOHOL CURVE,"[10] THE JURY SHOULD BE INSTRUCTED AS FOLLOWS:

[If you are satisfied beyond a reasonable doubt that there was [.08 grams or more of alcohol in 100 milliliters of the defendant's blood] [.08 grams or more of alcohol in 210 liters

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of the defendant's breath] at the time the test was taken, you may find from that fact alone that the defendant was under the influence of an intoxicant at the time of the alleged operating, but you are not required to do so. You the jury are here to decide this question on the basis of all the evidence in this case, and you should not find that the defendant was under the influence of an intoxicant at the time of the alleged operating, unless you are satisfied of that fact beyond a reasonable doubt.]

IF AN APPROVED TESTING DEVICE IS INVOLVED, THE FOLLOWING MAY BE ADDED:[11]

[The law recognizes that the testing device used in this case uses a scientifically sound method of measuring the alcohol concentration of an individual. The State is not required to prove the underlying scientific reliability of the method used by the testing device. However, the State is required to establish that the testing device was in proper working order and that it was correctly operated by a qualified person.]

IF THERE IS NO EVIDENCE OF THE DEFENSE DEFINED BY SECTION 940.09(2), USE THE FOLLOWING CLOSING:[12]

[Jury's Decision]

[If you are satisfied beyond a reasonable doubt that all three elements of this offense have been proved, you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.]

IF THERE IS EVIDENCE OF THE DEFENSE DEFINED BY SECTION 940.09(2),[13] USE THE FOLLOWING:

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[Consider Whether the Defense is Proved]

[Wisconsin law provides that it is a defense to this crime if the death would have occurred even if the defendant had been exercising due care and had not been under the influence of an intoxicant.

The burden is on the defendant to prove by evidence which satisfies you to a reasonable certainty by the greater weight of the credible evidence[14] that this defense is established.

"By the greater weight of the evidence" is meant evidence which, when weighed against that opposed to it, has more convincing power. "Credible evidence" is evidence which in the light of reason and common sense is worthy of belief.]

ADD THE FOLLOWING IF REQUESTED AND IF EVIDENCE OF THE CONDUCT OF THE VICTIM HAS BEEN INTRODUCED AS RELEVANT TO THE AFFIRMATIVE DEFENSE. DO NOT GIVE WITHOUT CLEAR JUSTIFICATION.[15]

[Evidence has been received relating to the conduct of (name of victim) at the time of the alleged crime. Any failure by (name of victim) to exercise due care[16] does not by itself provide a defense to the crime charged against the defendant.[17] Consider evidence of the conduct of (name of victim) in deciding whether the defendant has established that the death would have occurred even if the defendant had not been under the influence of an intoxicant and had been exercising due care.]

Jury's Decision

[If you are satisfied to a reasonable certainty by the greater weight of the credible evidence that this defense is proved, you must find the defendant not guilty.

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If you are not satisfied to a reasonable certainty by the greater weight of the credible evidence that this defense is proved and you are satisfied beyond a reasonable doubt that all elements of this offense have been proved, you should find the defendant guilty.

If you are not satisfied beyond a reasonable doubt that all elements of this offense have been proved, you must find the defendant not guilty.[18]]

COMMENT

Wis JI-Criminal 1185 was originally published in 1962 and revised in 1980, 1982, 1985, 1986, 1993, 2004, and 2006. This revision was approved by the Committee in February 2014; it revised footnotes 1 and 6.

This instruction is drafted for violations of § 940.09(1)(a), causing death while operating under the influence an intoxicant. For cases involving the death of an unborn child, see Wis JI-Criminal 1185A which identifies the changes that should be made in the instructions.

The 2006 revision reflected the correction made in § 885.235 by 2005 Wisconsin Act 8. That correction restored statutory authority for giving prima facie effect to test results in cases where the defendant has three or more priors. See Wis JI-Criminal 2600 Introductory Comment, sec. VII.

See Wis JI-Criminal 1186 for the related offense involving a prohibited alcohol concentration [PAC] of .08 or more. For persons with three or more priors, the PAC level is .02. See Wis JI-Criminal 1186A. For cases involving two charges — under the influence and PAC — see Wis JI-Criminal 1189.

Violations of § 940.09 are Class D felonies, unless "the person has one or more prior convictions, suspensions, or revocations, as counted under s. 343.307(2)." The latter are Class C felonies. Although the number of priors is a fact that determines the applicable penalty level, it is not an issue that is presented to the jury. "Other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." Apprendi v. New Jersey, 530 U.S. 466, 490 (2000) (emphasis added).

Section 940.09(2) provides that the defendant "has a defense if he or she proves by a preponderance of the evidence that the death would have occurred even if he or she had been exercising due care and he or she had not been under the influence . . ." The defense is addressed in the instruction by using an alternative ending, see text at footnote 13 and following. The defense was formerly addressed in a separate instruction, Wis JI Criminal 1188, which has been withdrawn. The constitutionality of the defense was upheld by the Wisconsin Supreme Court in State v. Caibaiosai, 122 Wis.2d 587, 363 N.W.2d 574 (1985). See Wis JI-Criminal 2600 Introductory Comment, Sec. X.

Offenses involving firearms and airguns are also covered by § 940.09, see sub. (1g) and Wis JI-Criminal 1190 and 1191.

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The 2004 revision adopted a new format for footnotes. Footnotes common to several instructions are collected in the Introductory Comment that precedes Wis JI-Criminal 2600. They are cross-referenced in the footnotes for the individual instructions to which they apply. Footnotes unique to individual instructions are included in full in those instructions.

1. This instruction is drafted for cases involving the influence of an intoxicant, which is defined to include "an alcohol beverage, hazardous inhalant, . . . a controlled substance or controlled substance analog under ch. 961, . . . any combination of an alcohol beverage, hazsardous inhalant, controlled substance and controlled substance analog, or . . . any other drug, or . . . an alcohol beverage and any other drug." See § 939.22(42) in note 6, below. For a model tailored to Motor Vehicle Code offenses involving the influence of a controlled substance, see Wis JI-Criminal 2664. For a model tailored to Motor Vehicle Code offenses involving the combined influence of an intoxicant and a controlled substance, see Wis JI-Criminal 2664A. For a model tailored to Motor Vehicle Code offenses involving a "hazardous inhalant," see Wis JI-Criminal 2667.

2. The statute applies to the "operation or handling" of a vehicle. The instruction uses "operates" throughout, on the assumption that conduct causing death would virtually always involve the operation of a vehicle.

3. Section 939.22(44) defines "vehicle" as follows:

> "Vehicle" means any self-propelled device for moving persons or property or pulling implements from one place to another, whether such device is operated on land, rails, water, or in the air.

4. Regarding the definition of "operate," see Wis JI-Criminal 2600 Introductory Comment, Sec. III.

5. The Committee concluded that the simple "substantial factor" definition of cause should be sufficient for most cases. Where there is evidence of more than one possible cause, something like the following might be added immediately preceding the sentence in the instruction beginning with "before":

> There may be more than one cause of death. The act of one person alone might produce it, or the acts of two or more persons might jointly produce it.

The statute does provide the defendant with an affirmative defense in certain situations, see footnote 12, below. The defense is closely related to the cause element but, in the Committee's judgment, deals with a different issue and may apply even if the defendant's operation was the cause of death as required by the second element. If the defendant's operation caused the death, the defense allows the defendant to avoid liability if it is established that the death would have occurred even if the defendant had not been under the influence and had been exercising due care. The constitutionality of eliminating causal negligence as an element and providing the affirmative defense was upheld by the Wisconsin Supreme Court in State v. Caibaiosai, 122 Wis.2d 587, 363 N.W.2d 574 (1985).

See Wis JI-Criminal 2600 Introductory Comment, Sec. X.

6. This instruction is drafted for cases involving the influence of an intoxicant. For a model tailored to Motor Vehicle Code offenses involving the influence of a controlled substance, see Wis JI-Criminal 2664. For a model tailored to Motor Vehicle Code offenses involving the combined influence of an intoxicant and a controlled substance, see Wis JI-Criminal 2664A. The definition in the instruction paraphrases the full definition provided in § 939.22(42):

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"Under the influence of an intoxicant" means that the actor's ability to operate a vehicle or handle a firearm or airgun is materially impaired because of his or her consumption of an alcohol beverage, hazardous inhalant, of a controlled substance or controlled substance analog under ch. 961, of any combination of an alcohol beverage, hazardous inhalant, controlled substance and controlled substance analog, or of any other drug or of an alcohol beverage and any other drug.

Note: "hazardous inhalant" was added to the definition in § 939.22(42) by 2013 Wisconsin Act 83 [effective date: Dec. 14, 2013]. Act 83 also created a definition of "hazardous inhalant" in § 939.22(15). For a model tailored to Motor Vehicle Code offenses involving a "hazardous inhalant," see Wis JI-Criminal 2667.

For a discussion of issues relating to the definition of "under the influence," see Wis JI-Criminal 2600 Introductory Comment, Sec. VIII.

7. This statement is supported by the general rule stated in § 885.235(1g) that the results of properly conducted alcohol tests are admissible. Whether the test result is accorded any additional evidentiary significance depends on the applicability of other provisions in § 885.235. See Wis JI-Criminal 2600 Introductory Comment, Sec. VII.

8. It may be that cases will be charged under § 940.09(1)(a) where a test has shown an alcohol concentration of more than 0.04 grams but less than 0.08 grams. Section 885.235(1)(b) provides that a test result in this range "is relevant evidence on intoxication . . . but is not to be given any prima facie effect." Wis JI-Criminal 232 provides an instruction for this situation.

9. Regarding the evidentiary significance of test results, see Wis JI-Criminal 2600 Introductory Comment, Sec. VII.

10. Regarding the "blood alcohol curve," see Wis JI-Criminal 2600 Introductory Comment, Sec. VII.

11. Regarding the reliability of the testing device, see Wis JI-Criminal 2600 Introductory Comment, Sec. VII.

12. Section 940.09(2) provides that the defendant "has a defense if he or she proves by a preponderance of the evidence that the death would have occurred even if he or she had been exercising due care and he or she had not been under the influence of an intoxicant . . ." When there is not "some evidence" of the defense in the case, this set of closing paragraphs should be used.

See Wis JI-Criminal 2600 Introductory Comment, Sec. X.

13. See note 12, supra. When there is "some evidence" of the defense in the case, the second set of closing paragraphs should be used.

14. Section 940.09(2) expressly places the burden on the defendant to prove the defense "by a preponderance of the evidence." The instruction describes the standard as "to a reasonable certainty, by the greater weight of the credible evidence," because the Committee concluded that "the greater weight" will be more easily understood by the jury than "preponderance."

15. The material that follows was drafted to respond to the recommendations made by the Wisconsin Supreme Court in State v. Lohmeier, 205 Wis.2d 182, 556 N.W.2d 90 (1996). The court recommended that an instruction be drafted to articulate the rule in § 939.14, **Criminal conduct or contributory negligence of victim no defense.** See Wis JI-Criminal 2600 Introductory Comment, Sec. X.

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16. The phrase "failure to exercise due care" is intended to refer to what might be characterized as "negligence" on the part of the victim. The Committee concluded that the term "negligence" should not be used because that highlights the conflict with the rule of § 939.14. The usual substitute for "negligence" would be a reference to the failure to exercise "ordinary care." The instruction uses "due care" instead because that is the term used in the statutory affirmative defense applicable to violations of §§ 940.09, 940.25 and 346.63. In cases involving the defense, it would be confusing to refer to "ordinary care" when referring to the victim's conduct and to "due care" when referring to the defendant's conduct. Because "due care" is used in the statute, the term is adopted for both references in this instruction. The Committee does not believe that there is a substantive difference between the two terms.

17. The instruction attempts to articulate a very fine distinction which, in the abstract, may be difficult to understand. "Defense" is used here to refer to a special rule of law providing a defense to the crime. However, in plain language, negligence on the part of the victim can be a reason why the defendant is not guilty of the charge. It could prevent the defendant's conduct from being the cause of the harm, or it could satisfy the requirements of the affirmative defense under § 940.09(2). The third sentence in the bracketed material is intended to address the recommendations in Lohmeier that a "bridging" instruction be drafted. See note 15, supra, and Wis JI-Criminal 2600 Introductory Comment, Sec. X.

18. This statement is included to assure that both options for a not guilty verdict are clearly presented:

1) not guilty because the elements have not been proved [regardless of the conclusion about the defense]; and

2) not guilty even though the elements have been proved, because the defense has been established.

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1185A VIOLATIONS OF § 940.09 AND § 940.25 INVOLVING AN UNBORN CHILD

FOR VIOLATIONS OF § 940.09 AND § 940.25 WHERE THE VICTIM WAS AN UNBORN CHILD MAKE THE FOLLOWING CHANGES IN THE APPLICABLE INSTRUCTION.

- In the opening paragraph, substitute "unborn child" for "another."

- Revise element 2. to read as follows:

2. The defendant's operation of a vehicle caused [the death of] [great bodily harm to] an unborn child.

   "Unborn child" means any individual of the human species from fertilization until birth that is gestating inside a woman.

COMMENT

Wis JI-Criminal 1185A was originally published in 1999. This revision was approved the Committee in February 2004.

The 2004 revision of this instruction changed it to provide suggested changes in the uniform instructions for violations of §§ 940.09 and 940.25 involving causing the death of or great bodily harm to an unborn child. Those instructions are:

JI 1185	HOMICIDE BY OPERATION OF A VEHICLE WHILE UNDER THE INFLUENCE — § 940.09(1)(a)
JI 1186	HOMICIDE BY OPERATION OF A VEHICLE WITH A PROHIBITED ALCOHOL CONCENTRATION — 0.08 GRAMS OR MORE — § 940.09(1)(b)
JI 1186A	HOMICIDE BY OPERATION OF A VEHICLE WITH A PROHIBITED ALCOHOL CONCENTRATION — 0.02 GRAMS OR MORE — § 940.09(1)(b)
JI 1189	HOMICIDE BY OPERATION OF A VEHICLE WHILE UNDER THE INFLUENCE/HOMICIDE BY OPERATION OF A VEHICLE WITH A PROHIBITED ALCOHOL CONCENTRATION — 0.08 GRAMS OR MORE — § 940.09(1)(a) and § 940.09(1)(b)
JI 1190	HOMICIDE BY OPERATION OR HANDLING OF A FIREARM WHILE UNDER THE INFLUENCE — § 940.09(1g)(a)
JI 1191	HOMICIDE BY OPERATION OR HANDLING OF A FIREARM WITH A PROHIBITED ALCOHOL CONCENTRATION — 0.08 GRAMS OR MORE — § 940.09(1g)(b)
JI 1262	INJURY (GREAT BODILY HARM) BY OPERATION OF A VEHICLE WHILE UNDER THE INFLUENCE — § 940.25(1)(a)

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JI 1263 INJURY (GREAT BODILY HARM) BY OPERATION OF A VEHICLE WITH A PROHIBITED ALCOHOL CONCENTRATION — 0.08 GRAMS OR MORE — § 940.25(1)(b)

JI 1263A INJURY (GREAT BODILY HARM) BY OPERATION OF A VEHICLE WITH A PROHIBITED ALCOHOL CONCENTRATION — 0.02 GRAMS OR MORE — § 940.25(1)(b)

The definition of "unborn child" is the one provided in § 939.75.

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1186 HOMICIDE BY OPERATION OF A VEHICLE WITH A PROHIBITED ALCOHOL CONCENTRATION — 0.08 GRAMS OR MORE — § 940.09(1)(b)

Statutory Definition of the Crime

Section 940.09(1)(b) of the Criminal Code of Wisconsin is violated by one who causes the death of another by the operation or handling of a vehicle while that person has a prohibited alcohol concentration.[1]

State's Burden of Proof

Before you may find the defendant guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following three elements were present.

Elements of the Crime That the State Must Prove

1. The defendant operated[2] a vehicle.[3]

   "Operate" means the physical manipulation or activation of any of the controls of a vehicle necessary to put it in motion.[4]

2. The defendant's operation of a vehicle caused the death of (name of victim).

   "Cause" means that the defendant's operation of a vehicle was a substantial factor[5] in producing the death.

3. The defendant had a prohibited alcohol concentration at the time the defendant operated a vehicle.

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Definition of "Prohibited Alcohol Concentration"

"Prohibited alcohol concentration" means[6]

[.08 grams or more of alcohol in 210 liters of the person's breath].

[.08 grams or more of alcohol in 100 milliliters of the person's blood].

How to Use the Test Result Evidence

The law states that the alcohol concentration in a defendant's (breath) (blood) (urine) sample taken within three hours of operating a vehicle is evidence of the defendant's alcohol concentration at the time of the operating.[7]

WHERE TEST RESULTS SHOWING 0.08 GRAMS OR MORE HAVE BEEN ADMITTED[8] AND THERE IS NO ISSUE RELATING TO THE DEFENDANT'S POSITION ON THE "BLOOD-ALCOHOL CURVE,"[9] THE JURY SHOULD BE INSTRUCTED AS FOLLOWS:

[If you are satisfied beyond a reasonable doubt that there was [.08 grams or more of alcohol in 100 milliliters of the defendant's blood] [.08 grams or more of alcohol in 210 liters of the defendant's breath] at the time the test was taken, you may find from that fact alone that the defendant had a prohibited alcohol concentration at the time of the alleged operating, but you are not required to do so. You the jury are here to decide this question on the basis of all the evidence in this case, and you should not find that the defendant had a prohibited alcohol concentration at the time of the alleged operating, unless you are satisfied of that fact beyond a reasonable doubt.]

IF AN APPROVED TESTING DEVICE IS INVOLVED, THE FOLLOWING MAY BE ADDED:[10]

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[The law recognizes that the testing device used in this case uses a scientifically sound method of measuring the alcohol concentration of an individual. The State is not required to prove the underlying scientific reliability of the method used by the testing device. However, the State is required to establish that the testing device was in proper working order and that it was correctly operated by a qualified person.]

IF THERE IS NO EVIDENCE OF THE DEFENSE DEFINED BY SECTION 940.09(2), USE THE FOLLOWING CLOSING:[11]

[Jury's Decision]

[If you are satisfied beyond a reasonable doubt that all three elements of this offense have been proved, you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.]

IF THERE IS EVIDENCE OF THE DEFENSE DEFINED BY SECTION 940.09(2),[12] USE THE FOLLOWING:

[Consider Whether the Defense is Proved]

[Wisconsin law provides that it is a defense to this crime if the death would have occurred even if the defendant had been exercising due care and had not had a prohibited alcohol concentration.

The burden is on the defendant to prove by evidence which satisfies you to a reasonable certainty by the greater weight of the credible evidence[13] that this defense is established.

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"By the greater weight of the evidence" is meant evidence which, when weighed against that opposed to it, has more convincing power. "Credible evidence" is evidence which in the light of reason and common sense is worthy of belief.]

ADD THE FOLLOWING IF REQUESTED AND IF EVIDENCE OF THE CONDUCT OF THE VICTIM HAS BEEN INTRODUCED AS RELEVANT TO THE AFFIRMATIVE DEFENSE. DO NOT GIVE WITHOUT CLEAR JUSTIFICATION.[14]

[Evidence has been received relating to the conduct of (name of victim) at the time of the alleged crime. Any failure by (name of victim) to exercise due care[15] does not by itself provide a defense to the crime charged against the defendant.[16] Consider evidence of the conduct of (name of victim) in deciding whether the defendant has established that the death would have occurred even if the defendant had not had a prohibited alcohol concentration and had been exercising due care.]

Jury's Decision

[If you are satisfied to a reasonable certainty by the greater weight of the credible evidence that this defense is proved, you must find the defendant not guilty.

If you are not satisfied to a reasonable certainty by the greater weight of the credible evidence that this defense is proved and you are satisfied beyond a reasonable doubt that all elements of this offense have been proved, you should find the defendant guilty.

If you are not satisfied beyond a reasonable doubt that all elements of this offense have been proved, you must find the defendant not guilty.[17]]

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COMMENT

Wis JI-Criminal 1186 was originally published in 1982 and revised in 1985, 1986, 1992, and 2004. This revision was approved by the Committee in June 2005.

This instruction is drafted for violations of § 940.09(1)(b) involving a prohibited alcohol concentration [PAC] of .08 or more. The 2004 revision reflected the change in the prohibited alcohol concentration level for persons with 2 or fewer priors from 0.10 to 0.08 made by 2003 Wisconsin Act 30. The change applies to all offenses committed on or after September 30, 2003. For persons with three or more priors, the PAC level is .02. For an instruction addressing that case, see Wis JI-Criminal 1186A.

The 2006 revision reflected the correction made in § 885.235 by 2005 Wisconsin Act 8. That correction restored statutory authority for giving prima facie effect to test results in cases where the defendant has three or more priors. See Wis JI-Criminal 2600 Introductory Comment, sec. VII.

For cases involving the death of an unborn child, see Wis JI-Criminal 1185A which identifies the changes that should be made in the instructions.

Violations of § 940.09 are Class D felonies, unless "the person has one or more prior convictions, suspensions, or revocations, as counted under s. 343.307(2)." The latter are Class C felonies. Although the number of priors is a fact that determines the applicable penalty level, it is not an issue that is presented to the jury. "Other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." Apprendi v. New Jersey, 530 U.S. 466, 490 (2000) (emphasis added).

See Wis JI-Criminal 1185 for the related offense of causing death while operating under the influence, as defined in § 940.09(1)(a). For cases involving two charges — operating under the influence and with a PAC — see Wis JI-Criminal 1189.

Section 940.09(2) provides that the defendant "has a defense if he or she proves by a preponderance of the evidence that the death would have occurred even if he or she had been exercising due care and he or she . . . did not have a prohibited alcohol concentration . . ." The defense is addressed in the instruction by using an alternative ending, see text at footnote 12 and following. The defense was formerly addressed in a separate instruction, Wis JI-Criminal 1188, which has been withdrawn. The constitutionality of the defense was upheld by the Wisconsin Supreme Court in State v. Caibaiosai, 122 Wis.2d 587, 363 N.W.2d 574 (1985). See Wis JI-Criminal 2600 Introductory Comment, Sec. X.

Offenses involving firearms and airguns are also covered by § 940.09, see sub. (1g) and Wis JI-Criminal 1190 and 1191.

The 2004 revision adopted a new format for footnotes. Footnotes common to several instructions are collected in the Introductory Comment that precedes Wis JI-Criminal 2600. They are cross-referenced by paragraph number in the footnotes for the individual instructions to which they apply. Footnotes unique to individual instructions are included in full in those instructions.

1. Section 940.09(1)(b) defines this offense as causing death by operation or handling a vehicle "while the person has a prohibited alcohol concentration as defined in s. 340.01(46m)." Section 340.01(46m), as amended by 2003 Wisconsin Act 30 [effective date: September 30, 2003], provides as follows:

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(46m) "Prohibited alcohol concentration" means one of the following:

(a) If the person has 2 or fewer prior convictions, suspensions or revocations, as counted under s. 343.307(1), an alcohol concentration of 0.08 or more.

[(b) — repealed]

(c) If the person has 3 or more prior convictions, suspensions or revocations, as counted under s. 343.307(1), an alcohol concentration of more than 0.02.

Section 340.01(1v) defines "alcohol concentration" as follows:

(1v) "Alcohol concentration" means any of the following:
(a) The number of grams of alcohol per 100 milliliters of a person's blood.
(b) The number of grams of alcohol per 210 liters of a persons's breath.

The instruction refers to "prohibited alcohol concentration" in the introductory paragraph and in the general statement of the third element. It then provides for using the appropriate measure of alcohol concentration — blood alcohol or alcohol in the breath — in the definition of the third element. For cases involving 0.02 level, see Wis JI-Criminal 1186A.

2. The statute applies to the "operation or handling" of a vehicle. The instruction uses "operates" throughout, on the assumption that conduct causing death would virtually always involve the operation of a vehicle.

3. Section 939.22(44) defines "vehicle" as follows:

"Vehicle" means any self-propelled device for moving persons or property or pulling implements from one place to another, whether such device is operated on land, rails, water, or in the air.

4. Regarding the definition of "operate," see Wis JI-Criminal 2600 Introductory Comment, Sec. III.

5. The Committee concluded that the simple "substantial factor" definition of cause should be sufficient for most cases. Where there is evidence of more than one possible cause, something like the following might be added immediately preceding the sentence in the instruction beginning with "before":

There may be more than one cause of death. The act of one person alone might produce it, or the acts of two or more persons might jointly produce it.

The statute does provide the defendant with an affirmative defense in certain situations, see footnote 11, below. The defense is closely related to the cause element but, in the Committee's judgment, deals with a different issue and may apply even if the defendant's operation was the cause of death as required by the second element. If the defendant's operation caused the death, the defense allows the defendant to avoid liability if it is established that the death would have occurred even if the defendant had not been under the influence and had been exercising due care. The constitutionality of eliminating causal negligence as an element and providing the affirmative defense was upheld by the Wisconsin Supreme Court in State v. Caibaiosai, 122 Wis.2d 587, 363 N.W.2d 574 (1985).

See Wis JI-Criminal 2600 Introductory Comment, Sec. X.

6. The definitions are provided in § 340.01(46m) and (1v). See Wis JI-Criminal 2600 Introductory Comment, Sec. V.

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7. This statement is supported by the general rule stated in § 885.235(1g) that the results of properly conducted alcohol tests are admissible. Whether the test result is accorded any additional evidentiary significance depends on the applicability of other provisions in § 885.235. See Wis JI-Criminal 2600 Introductory Comment, Sec. VII.

8. Regarding the evidentiary significance of test results, see Wis JI-Criminal 2600 Introductory Comment, Sec. VII.

9. Regarding the "blood alcohol curve," see Wis JI-Criminal 2600 Introductory Comment, Sec. VII.

10. Regarding the reliability of the testing device, see Wis JI-Criminal 2600 Introductory Comment, Sec. VII.

11. Section 940.09(2) provides that the defendant "has a defense if he or she proves by a preponderance of the evidence that the death would have occurred even if he or she had been exercising due care and he or she . . . did not have a prohibited alcohol concentration . . ." When there is not "some evidence" of the defense in the case, this set of closing paragraphs should be used.

See Wis JI-Criminal 2600 Introductory Comment, Sec. X.

12. See note 11, supra. When there is "some evidence" of the defense in the case, the second set of closing paragraphs should be used.

13. Section 940.09(2) expressly places the burden on the defendant to prove the defense "by a preponderance of the evidence." The instruction describes the standard as "to a reasonable certainty, by the greater weight of the credible evidence," because the Committee concluded that "the greater weight" will be more easily understood by the jury than "preponderance."

14. The material that follows was drafted to respond to the recommendations made by the Wisconsin Supreme Court in State v. Lohmeier, 205 Wis.2d 182, 556 N.W.2d 90 (1996). The court recommended that an instruction be drafted to articulate the rule in § 939.14, **Criminal conduct or contributory negligence of victim no defense.** See Wis JI-Criminal 2600 Introductory Comment, Sec. X.

15. The phrase "failure to exercise due care" is intended to refer to what might be characterized as "negligence" on the part of the victim. The Committee concluded that the term "negligence" should not be used because that highlights the conflict with the rule of § 939.14. The usual substitute for "negligence" would be a reference to the failure to exercise "ordinary care." The instruction uses "due care" instead because that is the term used in the statutory affirmative defense applicable to violations of §§ 940.09, 940.25 and 346.63. In cases involving the defense, it would be confusing to refer to "ordinary care" when referring to the victim's conduct and to "due care" when referring to the defendant's conduct. Because "due care" is used in the statute, the term is adopted for both references in this instruction. The Committee does not believe that there is a substantive difference between the two terms.

16. The instruction attempts to articulate a very fine distinction which, in the abstract, may be difficult to understand. "Defense" is used here to refer to a special rule of law providing a defense to the crime. However, in plain language, negligence on the part of the victim can be a reason why the defendant is not guilty of the charge. It could prevent the defendant's conduct from being the cause of the harm, or it could satisfy the requirements of the affirmative defense under § 940.09(2). The third sentence in the bracketed

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material is intended to address the recommendations in Lohmeier that a "bridging" instruction be drafted. See note 14, supra, and Wis JI-Criminal 2600 Introductory Comment, Sec. X.

17. This statement is included to assure that both options for a not guilty verdict are clearly presented:

1) not guilty because the elements have not been proved [regardless of the conclusion about the defense]; and

2) not guilty even though the elements have been proved, because the defense has been established.

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1186A HOMICIDE BY OPERATION OF A VEHICLE WITH A PROHIBITED ALCOHOL CONCENTRATION — 0.02 GRAMS OR MORE — § 940.09(1)(b)

Statutory Definition of the Crime

Section 940.09(1)(b) of the Criminal Code of Wisconsin is violated by one who causes the death of another by the operation or handling of a vehicle while that person has a prohibited alcohol concentration.[1]

State's Burden of Proof

Before you may find the defendant guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following [three] [four][2] elements were present.

Elements of the Crime That the State Must Prove

1. The defendant operated[3] a vehicle.[4]

   "Operate" means the physical manipulation or activation of any of the controls of a vehicle necessary to put it in motion.[5]

2. The defendant's operation of a vehicle caused the death of (name of victim).

   "Cause" means that the defendant's operation of a vehicle was a substantial factor[6] in producing the death.

3. The defendant had a prohibited alcohol concentration at the time the defendant operated a vehicle.

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Definition of "Prohibited Alcohol Concentration"

"Prohibited alcohol concentration" means[7]

[.02 grams or more of alcohol in 210 liters of the person's breath].

[.02 grams or more of alcohol in 100 milliliters of the person's blood].

NOTE: THE DEFENDANT'S ADMISSION OF THREE OR MORE PRIOR CONVICTIONS DISPENSES WITH THE NEED FOR PROOF OF THE FOLLOWING ELEMENT. IF THERE IS AN ADMISSION, DO NOT INSTRUCT ON THIS ELEMENT AND PROCEED TO THE PARAGRAPH CAPTIONED "HOW TO USE THE TEST RESULT EVIDENCE."[8]

[4. The defendant had three or more convictions, suspensions, or revocations, as counted under § 343.307(1).][9]

IF THE FOURTH ELEMENT IS INCLUDED AND IF REQUESTED BY THE DEFENDANT, THE FOLLOWING CAUTIONARY INSTRUCTION SHOULD BE GIVEN:[10]

[Evidence has been received that the defendant had prior convictions, suspensions, or revocations. This evidence was received as relevant to the status of the defendant's driving record, which is an issue in this case. It must not be used for any other purpose and, particularly, you should bear in mind that conviction, suspension, or revocation at some previous time is not proof that the defendant operated a motor vehicle with a prohibited alcohol concentration on this occasion.]

How to Use the Test Result Evidence

The law states that the alcohol concentration in a defendant's (breath) (blood) (urine) sample taken within three hours of operating a vehicle is evidence of the defendant's alcohol concentration at the time of the operating.[11]

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IF AN ALCOHOL TEST IS INVOLVED, THE FOLLOWING MAY BE ADDED:[12]

[The law recognizes that the testing device used in this case uses a scientifically sound method of measuring the alcohol concentration of an individual. The State is not required to prove the underlying scientific reliability of the method used by the testing device. However, the State is required to establish that the testing device was in proper working order and that it was correctly operated by a qualified person.]

IF THERE IS NO EVIDENCE OF THE DEFENSE DEFINED BY SECTION 940.09(2), USE THE FOLLOWING CLOSING:[13]

[Jury's Decision]

[If you are satisfied beyond a reasonable doubt that all the elements of this offense have been proved, you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.]

IF THERE IS EVIDENCE OF THE DEFENSE DEFINED BY SECTION 940.09(2),[14] USE THE FOLLOWING:

[Consider Whether the Defense is Proved]

[Wisconsin law provides that it is a defense to this crime if the death would have occurred even if the defendant had been exercising due care and had not had a prohibited alcohol concentration.

The burden is on the defendant to prove by evidence which satisfies you to a reasonable certainty by the greater weight of the credible evidence[15] that this defense is established.

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"By the greater weight of the evidence" is meant evidence which, when weighed against that opposed to it, has more convincing power. "Credible evidence" is evidence which in the light of reason and common sense is worthy of belief.]

ADD THE FOLLOWING IF REQUESTED AND IF EVIDENCE OF THE CONDUCT OF THE VICTIM HAS BEEN INTRODUCED AS RELEVANT TO THE AFFIRMATIVE DEFENSE. DO NOT GIVE WITHOUT CLEAR JUSTIFICATION.[16]

[Evidence has been received relating to the conduct of (name of victim) at the time of the alleged crime. Any failure by (name of victim) to exercise due care[17] does not by itself provide a defense to the crime charged against the defendant.[18] Consider evidence of the conduct of (name of victim) in deciding whether the defendant has established that the death would have occurred even if the defendant had not had a prohibited alcohol concentration and had been exercising due care.]

Jury's Decision

[If you are satisfied to a reasonable certainty by the greater weight of the credible evidence that this defense is proved, you must find the defendant not guilty.

If you are not satisfied to a reasonable certainty by the greater weight of the credible evidence that this defense is proved and you are satisfied beyond a reasonable doubt that all elements of this offense have been proved, you should find the defendant guilty.

If you are not satisfied beyond a reasonable doubt that all elements of this offense have been proved, you must find the defendant not guilty.[19]]

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COMMENT

This instruction was originally published as Wis JI-Criminal 1186.1 in 1992. In 1998, it was revised and renumbered Wis JI-Criminal 1186A. This revision was approved by the Committee in February 2004.

This instruction has been revised for use for offenses involving a prohibited alcohol concentration level [PAC] of .02 or more, which applies to persons with three or more priors. See § 340.01(46m)(c), created by 1999 Wisconsin Act 109. [Effective date: January 1, 2001.]

The fact of having three or more priors is included as a bracketed fourth element in this instruction. It is an element because the existence of priors changes the substantive definition of the crime from an alcohol concentration of .08 or more to one of .02 or more. It is in brackets because it is not to be submitted to the jury if the defendant admits having the priors. See footnotes 2 and 8, below. When priors change the offense from a forfeiture to a crime or increase the criminal penalty, they need not be submitted to the jury. See Apprendi v. New Jersey, 530 U.S. 466, 490 (2000) and Wis JI-Criminal 2600, Sec. IV, D.

The instruction previously published as Wis JI-Criminal 1186A dealt with a PAC of .08 or more. 2003 Wisconsin Act 30 changed the generally applicable PAC level to .08 or more for persons with 2 or fewer prior convictions, suspensions or revocations, as counted under § 343.307(1). [Effective date: September 30, 2003.] Wis JI-Criminal 1186 has been revised to apply to those cases.

See Wis JI-Criminal 1185 for the related offense of causing death while operating under the influence, as defined in § 940.09(1)(a). For cases involving the death of an unborn child, see Wis JI-Criminal 1185A which identifies the changes that should be made in the instructions.

Violations of § 940.09 are Class D felonies, unless "the person has one or more prior convictions, suspensions, or revocations, as counted under s. 343.307(2)." The latter are Class C felonies. Although the number of priors is a fact that determines the applicable penalty level, it is not an issue that is presented to the jury. "Other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." Apprendi v. New Jersey, 530 U.S. 466, 490 (2000) (emphasis added).

Section 940.09(2) provides that the defendant "has a defense if he or she proves by a preponderance of the evidence that the death would have occurred even if he or she had been exercising due care and he or she . . . did not have a prohibited alcohol concentration . . ." The defense is addressed in the instruction by using an alternative ending, see text at footnote 12 and following. The defense was formerly addressed in a separate instruction, Wis JI-Criminal 1188, which has been withdrawn. The constitutionality of the defense was upheld by the Wisconsin Supreme Court in State v. Caibaiosai, 122 Wis.2d 587, 363 N.W.2d 574 (1985). See Wis JI-Criminal 2600 Introductory Comment, Sec. X.

This revision adopts a new format for footnotes. Footnotes common to several instructions are collected in the Introductory Comment that precedes Wis JI-Criminal 2600. They are cross-referenced by paragraph number in the footnotes for the individual instructions to which they apply. Footnotes unique to individual instructions are included in full in those instructions.

1. Regarding the statutory definition of "prohibited alcohol concentration," see note 1, Wis JI-Criminal 1186.

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2. The instruction is drafted to allow for use with either three or four elements, depending on whether the fourth element, relating to the defendant having three or more prior convictions, suspensions or revocations, is submitted to the jury. See discussion at note 8, below.

3. The statute applies to the "operation or handling" of a vehicle. The instruction uses "operates" throughout, on the assumption that conduct causing death would virtually always involve the operation of a vehicle.

4. Section 939.22(44) defines "vehicle" as follows:

> "Vehicle" means any self-propelled device for moving persons or property or pulling implements from one place to another, whether such device is operated on land, rails, water, or in the air.

5. Regarding the definition of "operate," see Wis JI-Criminal 2600 Introductory Comment, Sec. III.

6. The Committee has concluded that the simple "substantial factor" definition of cause should be sufficient for most cases. See note 5, Wis JI-Criminal 1186.

7. The definitions are provided in § 340.01(46m) and (1v). See Wis JI-Criminal 2600 Introductory Comment, Sec. V.

8. The fourth element has been placed in brackets because the Committee concluded that the "status element" of this offense must be addressed in the same manner as for .08 offenses under the version of the law addressed in State v. Alexander, 214 Wis.2d 628, 571 N.W.2d 662 (1997). In Alexander, the Wisconsin Supreme Court referred to this element as a "status element" and held that if the defendant admits having two or more prior convictions, suspensions or revocations [the relevant number under prior law], the "admission dispenses with the need for proof of the status element, either to a jury or to a judge." 214 Wis.2d 628, 646. When there is an admission of the status element, "admitting any evidence of the defendant's prior convictions, suspensions or revocations and submitting the status element to the jury . . . [is] an erroneous exercise of discretion." 214 Wis.2d 628, 651. The court's rationale for removing an element in this situation was that the status element involves facts "entirely outside the gravamen of the offense" and "adds nothing to the State's evidentiary depth or descriptive narrative." 214 Wis.2d 628, 649-50.

The court gave explicit direction to the trial courts as to how to handle this situation:

> "When a circuit court is faced with the circumstances presented in this case, the circuit court should simply instruct the jury that they must find beyond a reasonable doubt that: 1) the defendant was driving or operating a motor vehicle on a highway; and 2) the defendant had a prohibited alcohol concentration at the time . . . The 'prohibited alcohol concentration' means 0.08 . . ."
> 214 Wis.2d 628, 651-52.

By placing the "status element" in brackets, the Committee intends to implement the approach approved in Alexander. If the defendant admits the "status element," the instruction should be given with three elements: causing death, by operating a vehicle, and, having an alcohol concentration of more than .02. If the defendant does not admit the "status element," the instruction should be given with a fourth element: having three or more prior convictions, suspensions or revocations as counted under § 343.307(1).

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Because the defendant's admission removes an element from the jury's consideration, the record should reflect the defendant's acknowledgment that a jury determination is, in effect, being waived on the "status element."

9. This element is not to be included if the defendant admits the priors. See note 8, supra.

The text of the fourth element is based on the definition of "prohibited alcohol concentration" in § 340.01(46m)(b). The types of convictions, suspensions, and revocations that are counted under § 343.307(1) are convictions for operating while intoxicated or suspensions or revocations for refusal to submit to chemical tests for alcohol. The priors may include offenses in other jurisdictions. The text of § 343.307(1) is provided in Wis JI-Criminal 2600 Introductory Comment.

The Committee concluded that the instruction should use the statutory language "as counted under § 343.307(1)" because evidence of the defendant's driving record will usually be submitted with testimony that the prior offenses are those that are counted under the statute.

10. Making the fact of prior convictions, etc., an issue for the jury creates the possibility that a jury may make improper use of the evidence relating to the defendant's driving record. Therefore, upon request, an instruction should be given on the limited use to be made of the driving record evidence. In State v. Ludeking, 195 Wis.2d 132, 536 N.W.2d 119 (Ct. App. 1995), the court pointed to this cautionary paragraph as a way to offset the inevitable prejudicial impact of presenting this evidence to the jury.

11. This statement is supported by the general rule stated in § 885.235(1g) that the results of properly conducted alcohol tests are admissible. However, the rest of that statute does not accord test results of .02 or more any prima facie effect. So there is no statutory authority for the typical statement that discusses test results like the ones included in the instructions for .08 offenses. See Wis JI-Criminal 2600 Introductory Comment, Sec. VII.

12. Regarding the reliability of the testing device, see Wis JI-Criminal 2600 Introductory Comment, Sec. VII.

13. Section 940.09(2) provides that the defendant "has a defense if he or she proves by a preponderance of the evidence that the death would have occurred even if he or she had been exercising due care and he or she . . . did not have a prohibited alcohol concentration . . ." When there is not "some evidence" of the defense in the case, this set of closing paragraphs should be used.

See Wis JI-Criminal 2600 Introductory Comment, Sec. X.

14. See note 12, supra. When there is "some evidence" of the defense in the case, the second set of closing paragraphs should be used.

15. Section 940.09(2) expressly places the burden on the defendant to prove the defense "by a preponderance of the evidence." The instruction describes the standard as "to a reasonable certainty, by the greater weight of the credible evidence," because the Committee concluded that "the greater weight" will be more easily understood by the jury than "preponderance."

16. The material that follows was drafted to respond to the recommendations made by the Wisconsin Supreme Court in State v. Lohmeier, 205 Wis.2d 182, 556 N.W.2d 90 (1996). The court recommended that

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an instruction be drafted to articulate the rule in § 939.14, **Criminal conduct or contributory negligence of victim no defense.** See Wis JI-Criminal 2600 Introductory Comment, Sec. X.

17. The phrase "failure to exercise due care" is intended to refer to what might be characterized as "negligence" on the part of the victim. The Committee concluded that the term "negligence" should not be used because that highlights the conflict with the rule of § 939.14. The usual substitute for "negligence" would be a reference to the failure to exercise "ordinary care." The instruction uses "due care" instead because that is the term used in the statutory affirmative defense applicable to violations of § § 940.09, 940.25 and 346.63. In cases involving the defense, it would be confusing to refer to "ordinary care" when referring to the victim's conduct and to "due care" when referring to the defendant's conduct. Because "due care" is used in the statute, the term is adopted for both references in this instruction. The Committee does not believe that there is a substantive difference between the two terms.

18. The instruction attempts to articulate a very fine distinction which, in the abstract, may be difficult to understand. "Defense" is used here to refer to a special rule of law providing a defense to the crime. However, in plain language, negligence on the part of the victim can be a reason why the defendant is not guilty of the charge. It could prevent the defendant's conduct from being the cause of the harm, or it could satisfy the requirements of the affirmative defense under § 940.09(2). The third sentence in the bracketed material is intended to address the recommendations in Lohmeier that a "bridging" instruction be drafted. See note 16, supra, and Wis JI-Criminal 2600 Introductory Comment, Sec. X.

19. This statement is included to assure that both options for a not guilty verdict are clearly presented:

1) not guilty because the elements have not been proved [regardless of the conclusion about the defense]; and

2) not guilty even though the elements have been proved, because the defense has been established.

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1187 HOMICIDE BY OPERATION OF A VEHICLE WITH A DETECTABLE AMOUNT OF A RESTRICTED CONTROLLED SUBSTANCE — § 940.09(1)(am)

Statutory Definition of the Crime

Section 940.09(1)(am) of the Criminal Code of Wisconsin is violated by one who causes the death of another by the operation or handling of a vehicle while the person has a detectable amount of a restricted controlled substance in his or her blood.

State's Burden of Proof

Before you may find the defendant guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following three elements were present.

Elements of the Crime That the State Must Prove

1. The defendant operated[1] a vehicle.[2]

   "Operate" means the physical manipulation or activation of any of the controls of a vehicle necessary to put it in motion.[3]

2. The defendant's operation of a vehicle caused the death of (name of victim).

   "Cause" means that the defendant's operation of a vehicle was a substantial factor[4] in producing the death.

3. The defendant had a detectable amount of a restricted controlled substance in his or her blood at the time the defendant operated a vehicle.

   (Name restricted controlled substance) is a restricted controlled substance.[5]

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How to Use the Test Result Evidence

The law states that a chemical analysis showing a detectable amount of a restricted controlled substance in a defendant's blood sample is evidence of the presence of a detectable amount of a restricted controlled substance in a defendant's blood at the time of the operating.[6]

USE THE FOLLOWING IF APPROPRIATE:

[If you are satisfied beyond a reasonable doubt that there was a detectable amount of (name restricted controlled substance) in the defendant's blood at the time the sample was taken, you may find from that fact alone that the defendant had a detectable amount of (name restricted controlled substance) in (his) (her) blood at the time of the operating but you are not required to do so. You the jury are here to decide this question on the basis of all the evidence in this case, and you should not find that the defendant had a detectable amount of (name restricted controlled substance) in (his) (her) blood at the time of the alleged operating unless you are satisfied of that fact beyond a reasonable doubt.]

IF THERE IS NO EVIDENCE OF THE DEFENSE DEFINED BY SECTION 940.09(2), USE THE FOLLOWING CLOSING:[7]

[Jury's Decision]

[If you are satisfied beyond a reasonable doubt that all three elements of this offense have been proved, you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.]

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IF THERE IS EVIDENCE OF THE DEFENSE DEFINED BY SECTION 940.09(2),[8] USE THE FOLLOWING:

[Consider Whether the Defense is Proved]

[Wisconsin law provides that it is a defense to this crime if the death would have occurred even if the defendant had been exercising due care and had not had a detectable amount of (name restricted controlled substance) in his or her blood.

The burden is on the defendant to prove by evidence which satisfies you to a reasonable certainty by the greater weight of the credible evidence[9] that this defense is established.

"By the greater weight of the evidence" is meant evidence which, when weighed against that opposed to it, has more convincing power. "Credible evidence" is evidence which in the light of reason and common sense is worthy of belief.]

ADD THE FOLLOWING IF REQUESTED AND IF EVIDENCE OF THE CONDUCT OF THE VICTIM HAS BEEN INTRODUCED AS RELEVANT TO THE AFFIRMATIVE DEFENSE. DO NOT GIVE WITHOUT CLEAR JUSTIFICATION.[10]

[Evidence has been received relating to the conduct of (name of victim) at the time of the alleged crime. Any failure by (name of victim) to exercise due care[11] does not by itself provide a defense to the crime charged against the defendant.[12] Consider evidence of the conduct of (name of victim) in deciding whether the defendant has established that the death would have occurred even if the defendant had not had a detectable amount of (name restricted controlled substance) in his or her blood.]

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Jury's Decision

[If you are satisfied to a reasonable certainty by the greater weight of the credible evidence that this defense is proved, you must find the defendant not guilty.

If you are not satisfied to a reasonable certainty by the greater weight of the credible evidence that this defense is proved and you are satisfied beyond a reasonable doubt that all elements of this offense have been proved, you should find the defendant guilty.

If you are not satisfied beyond a reasonable doubt that all elements of this offense have been proved, you must find the defendant not guilty.[13]]

COMMENT

Wis JI-Criminal 1187 was originally published in 2007. This revision involved nonsubstantive editorial changes and was approved by the Committee in June 2010.

This instruction is drafted for violations of § 940.09(1)(am), causing death while operating a vehicle with a detectable amount of a restricted controlled substance. The statute was created by 2003 Wisconsin Act 97 and applies to offenses committed on or after the Act's effective date: December 19, 2003. For a general discussion of Act 97, see Wis JI-Criminal 2600 Introductory Comment, Sec. IX.

This instruction may be useful as a model for violations of § 940.25(1)(am) and § 346.63(2)(a)3., which address causing great bodily harm and causing injury by operating with a detectable amount of a restricted controlled substance. There are no uniform instructions for those offenses.

Violations of § 940.09 are Class D felonies, unless "the person has one or more prior convictions, suspensions, or revocations, as counted under s. 343.307(2)." The latter are Class C felonies. Although the number of priors is a fact that determines the applicable penalty level, it is not an issue that is presented to the jury. "Other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." Apprendi v. New Jersey, 530 U.S. 466, 490 (2000) (emphasis added).

Section 940.09(2) provides that the defendant "has a defense if he or she proves by a preponderance of the evidence that the death would have occurred even if he or she had been exercising due care and . . . he or she did not have a detectable amount of a restricted controlled substance in his or her blood . . ." The defense is addressed in the instruction by using an alternative ending, see text at footnote 8 and following. The constitutionality of the defense was upheld by the Wisconsin Supreme Court in State v. Caibaiosai, 122 Wis.2d 587, 363 N.W.2d 574 (1985). See Wis JI-Criminal 2600 Introductory Comment, Sec. X.

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Footnotes common to several instructions are collected in the Introductory Comment that precedes Wis JI-Criminal 2600. They are cross-referenced in the footnotes for the individual instructions to which they apply. Footnotes unique to individual instructions are included in full in those instructions.

1. The statute applies to the "operation or handling" of a vehicle. The instruction uses "operates" throughout, on the assumption that conduct causing death would virtually always involve the operation of a vehicle.

2. Section 939.22(44) defines "vehicle" as follows:

"Vehicle" means any self-propelled device for moving persons or property or pulling implements from one place to another, whether such device is operated on land, rails, water, or in the air.

3. Regarding the definition of "operate," see Wis JI-Criminal 2600 Introductory Comment, Sec. III.

4. The Committee concluded that the simple "substantial factor" definition of cause should be sufficient for most cases. Where there is evidence of more than one possible cause, something like the following might be added immediately preceding the sentence in the instruction beginning with "before":

There may be more than one cause of death. The act of one person alone might produce it, or the acts of two or more persons might jointly produce it.

The statute does provide the defendant with an affirmative defense in certain situations, see footnote 8, below. The defense is closely related to the cause element but, in the Committee's judgment, deals with a different issue and may apply even if the defendant's operation was the cause of death as required by the second element. If the defendant's operation caused the death, the defense allows the defendant to avoid liability if it is established that the death would have occurred even if the defendant had not been operating "with a detectable amount" and had been exercising due care. The constitutionality of eliminating causal negligence as an element and providing the affirmative defense was upheld by the Wisconsin Supreme Court in State v. Caibaiosai, 122 Wis.2d 587, 363 N.W.2d 574 (1985).

See Wis JI-Criminal 2600 Introductory Comment, Sec. X.

5. The Committee concluded that it adds clarity to tell the jury that the alleged substance does qualify as a restricted controlled substance under the statute. Whether the defendant actually had a detectable amount of the substance in his or her blood remains a jury question.

Section 340.01(50m) defines "restricted controlled substance" as follows:

(50m) 'Restricted controlled substance' means any of the following:

(a) A controlled substance included in schedule I other than tetrahydrocannabinol.
(b) A controlled substance analog, as defined in s. 961.01(4m), of a controlled substance described in par. (a).
(c) Cocaine or any of its metabolites.
(d) Methamphetamine.
(e) Delta-9-tetrahydrocannabinol.

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6. This statement is similar to the one used for the results of properly conducted alcohol tests. See, for example, Wis JI-Criminal 2663. [The Committee's general approach to instructing on test results is discussed in Wis JI-Criminal 2600 Introductory Comment, Sec. VII.] The Committee concluded that it is proper to use it for tests in "restricted controlled substance" cases as well.

Whether additional instruction on the evidentiary significance of the test should be given is not clear, however, because the statute created for "detectable amount of a restricted controlled substance" cases is not phrased in the same way that the alcohol test statutes are. Section 885.235(1k), created by 2003 Wisconsin Act 97, reads as follows:

> 885.235(1k) In any action or proceeding in which it is material to prove that a person had a detectable amount of a restricted controlled substance in his or her blood while operating or driving a motor vehicle . . . if a chemical analysis of a sample of the person's blood shows that the person had a detectable amount of a restricted controlled substance in his or her blood, the court shall treat the analysis as prima facie evidence on the issue of the person having a detectable amount of a restricted controlled substance in his or her blood without requiring any expert testimony as to its effect.

Comparing this statute to § 885.235(1g), the statute addressing alcohol tests, reveals several differences:

- sub. (1k) does not require that the test be taken within 3 hours of driving;
- sub. (1k) does not directly provide for admissibility of test results; and,
- sub. (1k) does not explicitly connect having a detectable amount in the blood at the time of the test with having a detectable amount at the time of driving.

As to the second difference — admissibility — the Committee concluded that the statement "the court shall treat the analysis as prima facie evidence" strongly implies that the analysis is admissible. As to the third difference — connection with the time of driving — the Committee concluded that the statement "the court shall treat the analysis as prima facie evidence on the issue of the person having . . ." may express a legislative intent that the analysis be admissible to prove the material issue "that a person had a detectable amount of a restricted controlled substance in his or her blood while operating or driving a motor vehicle . . ." as stated at the beginning of sub. (1k). For that reason, the instruction includes a paragraph that addresses the "prima facie" effect of the chemical analysis. The paragraph is in brackets to suggest that trial courts make an independent determination about whether its use is appropriate. To be admissible, the analysis must be found to be relevant to the issue which it is offered to prove.

7. Section 940.09(2) provides that the defendant "has a defense if he or she proves by a preponderance of the evidence that the death would have occurred even if he or she had been exercising due care and he or she had not been under the influence of an intoxicant . . ." When there is not "some evidence" of the defense in the case, this set of closing paragraphs should be used.

See Wis JI-Criminal 2600 Introductory Comment, Sec. X.

8. See note 7, supra. When there is "some evidence" of the defense in the case, the second set of closing paragraphs should be used.

9. Section 940.09(2) expressly places the burden on the defendant to prove the defense "by a preponderance of the evidence." The instruction describes the standard as "to a reasonable certainty, by the

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greater weight of the credible evidence," because the Committee concluded that "the greater weight" will be more easily understood by the jury than "preponderance."

10. The material that follows was drafted to respond to the recommendations made by the Wisconsin Supreme Court in State v. Lohmeier, 205 Wis.2d 182, 556 N.W.2d 90 (1996). The court recommended that an instruction be drafted to articulate the rule in § 939.14, Criminal conduct or contributory negligence of victim no defense. See Wis JI-Criminal 2600 Introductory Comment, Sec. X.

11. The phrase "failure to exercise due care" is intended to refer to what might be characterized as "negligence" on the part of the victim. The Committee concluded that the term "negligence" should not be used because that highlights the conflict with the rule of § 939.14. The usual substitute for "negligence" would be a reference to the failure to exercise "ordinary care." The instruction uses "due care" instead because that is the term used in the statutory affirmative defense applicable to violations of §§ 940.09, 940.25 and 346.63. In cases involving the defense, it would be confusing to refer to "ordinary care" when referring to the victim's conduct and to "due care" when referring to the defendant's conduct. Because "due care" is used in the statute, the term is adopted for both references in this instruction. The Committee does not believe that there is a substantive difference between the two terms.

12. The instruction attempts to articulate a very fine distinction which, in the abstract, may be difficult to understand. "Defense" is used here to refer to a special rule of law providing a defense to the crime. However, in plain language, negligence on the part of the victim can be a reason why the defendant is not guilty of the charge. It could prevent the defendant's conduct from being the cause of the harm, or it could satisfy the requirements of the affirmative defense under § 940.09(2). The third sentence in the bracketed material is intended to address the recommendations in Lohmeier that a "bridging" instruction be drafted. See note 10, supra, and Wis JI-Criminal 2600 Introductory Comment, Sec. X.

13. This statement is included to assure that both options for a not guilty verdict are clearly presented:

1) not guilty because the elements have not been proved [regardless of the conclusion about the defense]; and

2) not guilty even though the elements have been proved, because the defense has been established.

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1188 HOMICIDE BY INTOXICATED USER OF VEHICLE, FIREARM, OR AIRGUN: AFFIRMATIVE DEFENSE UNDER § 940.09(2)

[INSTRUCTION WITHDRAWN]

COMMENT

Wis JI-Criminal 1188 was originally published in 1993 and revised in 1995, 1997 and 1998. It was withdrawn in 2004.

This instruction provided material describing the affirmative defense that applies to violations of § 940.09. The material was to be added to the instructions for the applicable offenses. In 2004, the instructions for violations of § 940.09 and § 940.25 were revised to incorporate instruction on the defense. See Wis JI-Criminal 1185, 1186, 1186A, 1189, 1190, 1191, 1262, 1263, and 1263A.

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1189 HOMICIDE BY OPERATION OF A VEHICLE WHILE UNDER THE INFLUENCE / HOMICIDE BY OPERATION OF A VEHICLE WITH A PROHIBITED ALCOHOL CONCENTRATION OF 0.08 GRAMS OR MORE — § 940.09(1)(a) and § 940.09(1)(b)

Description of the Charges

The first count in the criminal complaint charges that the defendant caused the death of another by the operation or handling of a vehicle while under the influence of an intoxicant[1] in violation of § 940.09(1)(a) of the Wisconsin Statutes.

The second count in the criminal complaint charges that the defendant caused the death of another by the operation or handling of a vehicle on a highway while the defendant had a prohibited alcohol concentration in violation of § 940.09(1)(b) of the Wisconsin Statutes.

To these charges, the defendant has entered pleas of not guilty which means the State must prove every element of each offense charged beyond a reasonable doubt.[2]

It is for you to determine whether the defendant is guilty of one, both, or neither of the offenses charged. You must make a finding of guilty or not guilty for each offense charged.[3]

Each count charges a separate offense, and you must consider each one separately.

Definition of Count 1 — Homicide By Operation Of A Vehicle While Under The Influence Of An Intoxicant

Section 940.09(1)(a) of the Criminal Code of Wisconsin is violated by one who causes the death of another by the operation or handling of a vehicle while under the influence of an intoxicant.[4]

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State's Burden of Proof

Before you may find the defendant guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following three elements were present.

Elements of Count 1 — Homicide By Operation Of A Vehicle While Under The Influence Of An Intoxicant

1. The defendant operated[5] a vehicle.[6]

   "Operate" means the physical manipulation or activation of any of the controls of a vehicle necessary to put it in motion.[7]

2. The defendant's operation of a vehicle caused the death of (name of victim).

   "Cause" means that the defendant's operation of a vehicle was a substantial factor[8] in producing the death.

3. The defendant was under the influence of an intoxicant at the time the defendant operated a vehicle.

Definition of "Under the Influence of an Intoxicant"

"Under the influence of an intoxicant" means that the defendant's ability to operate a vehicle was materially impaired because of consumption of an alcoholic beverage.[9]

Not every person who has consumed alcoholic beverages is "under the influence" as that term is used here. What must be established is that the person has consumed a sufficient amount of alcohol to cause the person to be less able to

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exercise the clear judgment and steady hand necessary to handle and control a motor vehicle.

It is not required that impaired ability to operate be demonstrated by particular acts of unsafe driving. What is required is that the person's ability to safely control the vehicle be materially impaired.

Definition of Count 2 — Homicide By Operation Of A Vehicle With A Prohibited Alcohol Concentration

Section 940.09(1)(b) of the Wisconsin Statutes is violated by one who operates or handles a vehicle on a highway with a prohibited alcohol concentration.

State's Burden of Proof

Before you may find the defendant guilty of this offense, the State must satisfy you beyond a reasonable doubt that the following three elements were present.

Elements of Count 2 — Homicide By Operation Of A Vehicle With A Prohibited Alcohol Concentration

1. The defendant operated a vehicle.
2. The defendant's operation of a vehicle caused the death of (name of victim).
3. The defendant had a prohibited alcohol concentration at the time the defendant operated a motor vehicle.

"Prohibited alcohol concentration" means[10]

[.08 grams or more of alcohol in 210 liters of the person's breath].

[.08 grams or more of alcohol in 100 milliliters of the person's blood].

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How to Use the Test Result Evidence

The law states that the alcohol concentration in a defendant's (breath) (blood) (urine) sample taken within three hours of operating a motor vehicle is evidence of the defendant's alcohol concentration at the time of the operating.[11]

WHERE TEST RESULTS SHOWING 0.08 GRAMS OR MORE HAVE BEEN ADMITTED[12] AND THERE IS NO ISSUE RELATING TO THE DEFENDANT'S POSITION ON THE "BLOOD-ALCOHOL CURVE,"[13] THE JURY SHOULD BE INSTRUCTED AS FOLLOWS:

[If you are satisfied beyond a reasonable doubt that there was [.08 grams or more of alcohol in 100 milliliters of the defendant's blood] [.08 grams or more of alcohol in 210 liters of the defendant's breath] at the time the test was taken, you may find from that fact alone that the defendant was under the influence of an intoxicant at the time of the alleged operating or that the defendant had a prohibited alcohol concentration at the time of the alleged operating, or both, but you are not required to do so. You the jury are here to decide these questions on the basis of all the evidence in this case, and you should not find that the defendant was under the influence of an intoxicant at the time of the alleged operating or that the defendant had a prohibited alcohol concentration at the time of the alleged operating, or both, unless you are satisfied of that fact beyond a reasonable doubt.]

IF AN APPROVED TESTING DEVICE IS INVOLVED, THE FOLLOWING MAY BE ADDED:[14]

[The law recognizes that the testing device used in this case uses a scientifically sound method of measuring the alcohol concentration of an individual. The State is not required to prove the underlying scientific reliability of the method used by the testing device.

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However, the State is required to establish that the testing device was in proper working order and that it was correctly operated by a qualified person.]

IF THERE IS NO EVIDENCE OF THE DEFENSE DEFINED BY SECTION 940.09(2), USE THE FOLLOWING CLOSING:[15]

[Jury's Decision]

[If you are satisfied beyond a reasonable doubt that the defendant caused the death of another by the operation of a vehicle while under the influence of an intoxicant, you should find the defendant guilty of Count 1.

If you are not so satisfied, you must find the defendant not guilty of Count 1.

If you are satisfied beyond a reasonable doubt that the defendant caused the death of another by the operation of a vehicle while the defendant had a prohibited alcohol concentration, you should find the defendant guilty of Count 2.

If you are not so satisfied, you must find the defendant not guilty of Count 2.]

IF THERE IS EVIDENCE OF THE DEFENSE DEFINED BY SECTION 940.09(2),[16] USE THE FOLLOWING:

[Consider Whether the Defense is Proved]

[Wisconsin law provides that it is a defense to the crime charged in Count 1 if the death would have occurred even if the defendant had been exercising due care and had not been under the influence of an intoxicant.

Wisconsin law further provides that it is a defense to the crime charged in Count 2 if the death would have occurred even if the defendant had been exercising due care and had not had a prohibited alcohol concentration.

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The burden is on the defendant to prove by evidence which satisfies you to a reasonable certainty by the greater weight of the credible evidence[17] that this defense is established as to each count.

"By the greater weight of the evidence" is meant evidence which, when weighed against that opposed to it, has more convincing power. "Credible evidence" is evidence which in the light of reason and common sense is worthy of belief.]

ADD THE FOLLOWING IF REQUESTED AND IF EVIDENCE OF THE CONDUCT OF THE VICTIM HAS BEEN INTRODUCED AS RELEVANT TO THE AFFIRMATIVE DEFENSE. DO NOT GIVE WITHOUT CLEAR JUSTIFICATION[18]

[Evidence has been received relating to the conduct of (name of victim) at the time of the alleged crime. Any failure by (name of victim) to exercise due care[19] does not by itself provide a defense to the crime charged against the defendant.[20] Consider evidence of the conduct of (name of victim) in deciding whether the defendant has established that the death would have occurred even if the defendant had been exercising due care and had not been under the influence of an intoxicant or had not had a prohibited alcohol concentration.]

Jury's Decision

[If you are satisfied to a reasonable certainty by the greater weight of the credible evidence that the defense is proved as to Count 1, you must find the defendant not guilty of Count 1.

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If you are not satisfied that the defense is proved as to Count 1 and you are satisfied beyond a reasonable doubt that all elements of the offense have been proved as to Count 1, you should find the defendant guilty of Count 1.

If you are not satisfied beyond a reasonable doubt that all elements of the offense have been proved as to Count 1, you must find the defendant not guilty of Count 1.[21]

If you are satisfied to a reasonable certainty by the greater weight of the credible evidence that the defense is proved as to Count 2, you must find the defendant not guilty of Count 2.

If you are not satisfied that the defense is proved as to Count 2 and you are satisfied beyond a reasonable doubt that all elements of the offense have been proved as to Count 2, you should find the defendant guilty of Count 2.

If you are not satisfied beyond a reasonable doubt that all elements of the offense have been proved as to Count 2, you must find the defendant not guilty of Count 2.[22]]

COMMENT

Wis JI-Criminal 1189 was originally published in 2004 and revised in 2006. This revision was approved by the Committee in February 2014.

This instruction is drafted for the case where two counts of homicide by intoxicated use of a vehicle under § 940.09 based on the same incident are submitted to the jury: one alleging causing death by the operation of a vehicle while under the influence and one alleging causing death by the operation of a vehicle with a prohibited alcohol concentration of 0.08 or more. It includes the affirmative defense recognized by sub. (2) of § 940.09. Regarding the defense, see Wis JI-Criminal 2600, Sec. X.

This instruction is a combination of Wis JI-Criminal 1185 and 1186. It attempts to streamline the instructions in a two-charge case by avoiding the reading of the complete instruction for each charge.

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The 2006 revision reflected the correction made in § 885.235 by 2005 Wisconsin Act 8. That correction restored statutory authority for giving prima facie effect to test results in cases where the defendant has three or more priors. See Wis JI-Criminal 2600 Introductory Comment, sec. VII.

Violations of § 940.09 are Class D felonies, unless "the person has one or more prior convictions, suspensions, or revocations, as counted under s. 343.307(2)." The latter are Class C felonies. Although the number of priors is a fact that determines the applicable penalty level, it is not an issue that is presented to the jury. "Other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." Apprendi v. New Jersey, 530 U.S. 466, 490 (2000) (emphasis added).

For cases involving the death of an unborn child, see Wis JI-Criminal 1185A which identifies the changes that should be made in the instructions.

1. This instruction is drafted for cases involving the influence of an intoxicant, which is defined to include "an alcohol beverage, hazardous inhalant, . . . a controlled substance or controlled substance analog under ch. 961, . . . any combination of an alcohol beverage, hazardous inhalant, controlled substance and controlled substance analog, or . . . any other drug, or . . . an alcohol beverage and any other drug." See § 939.22(42) in note 9, below. For a model tailored to Motor Vehicle Code offenses involving the influence of a controlled substance, see Wis JI-Criminal 2664. For a model tailored to Motor Vehicle Code offenses involving the combined influence of an intoxicant and a controlled substance, see Wis JI-Criminal 2664A. For a model tailored to Motor Vehicle Code offenses involving a "hazardous inhalant," see Wis JI-Criminal 2667.

2. This statement is the equivalent of Wis JI-Criminal 115, One Defendant: Two Counts. If Wis JI-Criminal 115 is also given, the sentence need not be repeated here.

3. This statement is the equivalent of Wis JI-Criminal 484, . . . One Defendant: Two Counts . . . If Wis JI-Criminal 484 is also given, the sentence need not be repeated here.

4. This instruction is drafted for cases involving the influence of an intoxicant. See note 1, supra.

5. The statute applies to the "operation or handling" of a vehicle. The instruction uses "operates" throughout, on the assumption that conduct causing death would virtually always involve the operation of a vehicle.

6. Section 939.22(44) defines "vehicle" as follows:

> "Vehicle" means any self-propelled device for moving persons or property or pulling implements from one place to another, whether such device is operated on land, rails, water, or in the air.

7. Regarding the definition of "operate," see Wis JI-Criminal 2600 Introductory Comment, Sec. III.

8. The Committee concluded that the simple "substantial factor" definition of cause should be sufficient for most cases. Where there is evidence of more than one possible cause, something like the following might be added immediately preceding the sentence in the instruction beginning with "before":

> There may be more than one cause of death. The act of one person alone might produce it, or the acts of two or more persons might jointly produce it.

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The statute does provide the defendant with an affirmative defense in certain situations, see footnote 15, below. The defense is closely related to the cause element but, in the Committee's judgment, deals with a different issue and may apply even if the defendant's operation was the cause of death as required by the second element. If the defendant's operation caused the death, the defense allows the defendant to avoid liability if it is established that the death would have occurred even if the defendant had not been under the influence and had been exercising due care. The constitutionality of eliminating causal negligence as an element and providing the affirmative defense was upheld by the Wisconsin Supreme Court in State v. Caibaiosai, 122 Wis.2d 587, 363 N.W.2d 574 (1985).

See Wis JI-Criminal 2600 Introductory Comment, Sec. X.

9. This instruction is drafted for cases involving the influence of an intoxicant. For a model tailored to Motor Vehicle Code offenses involving the influence of a controlled substance, see Wis JI-Criminal 2664. For a model tailored to Motor Vehicle Code offenses involving the combined influence of an intoxicant and a controlled substance, see Wis JI-Criminal 2664A. The definition in the instruction paraphrases the full definition provided in § 939.22(42):

> "Under the influence of an intoxicant" means that the actor's ability to operate a vehicle or handle a firearm or airgun is materially impaired because of his or her consumption of an alcohol beverage, hazardous inhalant, of a controlled substance or controlled substance analog under ch. 961, of any combination of an alcohol beverage, hazardous inhalant, controlled substance and controlled substance analog, or of any other drug or of an alcohol beverage and any other drug.

Note: "hazardous inhalant" was added to the definition in § 939.22(42) by 2013 Wisconsin Act 83 [effective date: Dec. 14, 2013]. Act 83 also created a definition of "hazardous inhalant" in § 939.22(15). For a model tailored to Motor Vehicle Code offenses involving a "hazardous inhalant," see Wis JI-Criminal 2667.

For a discussion of issues relating to the definition of "under the influence," see Wis JI-Criminal 2600 Introductory Comment, Sec. VIII.

10. The definitions are provided in § 340.01(46m) and (1v). See Wis JI-Criminal 2600 Introductory Comment, Sec. V.

11. This statement is supported by the general rule stated in § 885.235(1g) that the results of properly conducted alcohol tests are admissible. Whether the test result is accorded any additional evidentiary significance depends on the applicability of other provisions in § 885.235. See Wis JI-Criminal 2600 Introductory Comment, Sec. VII.

12. Regarding the evidentiary significance of test results, see Wis JI-Criminal 2600 Introductory Comment, Sec. VII.

13. Regarding the "blood alcohol curve," see Wis JI-Criminal 2600 Introductory Comment, Sec. VII.

14. Regarding the reliability of the testing device, see Wis JI-Criminal 2600 Introductory Comment, Sec. VII.

15. Section 940.09(2) provides that the defendant "has a defense if he or she proves by a preponderance of the evidence that the death would have occurred even if he or she had been exercising due care and he or she had not been under the influence of an intoxicant or did not have [a prohibited] alcohol concentration . . ." When there is not "some evidence" of the defense in the case, this set of closing paragraphs should be used.

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16. See note 15, supra. When there is "some evidence" of the defense in the case, the second set of closing paragraphs should be used.

17. Section 940.09(2) expressly places the burden on the defendant to prove the defense "by a preponderance of the evidence." The instruction describes the standard as "to a reasonable certainty, by the greater weight of the credible evidence," because the Committee concluded that "the greater weight" will be more easily understood by the jury than "preponderance."

18. The material that follows was drafted to respond to the recommendations made by the Wisconsin Supreme Court in State v. Lohmeier, 205 Wis.2d 182, 556 N.W.2d 90 (1996). The court recommended that an instruction be drafted to articulate the rule in § 939.14, **Criminal conduct or contributory negligence of victim no defense.** See Wis JI-Criminal 2600 Introductory Comment, Sec. X.

19. The phrase "failure to exercise due care" is intended to refer to what might be characterized as "negligence" on the part of the victim. The Committee concluded that the term "negligence" should not be used because that highlights the conflict with the rule of § 939.14. The usual substitute for "negligence" would be a reference to the failure to exercise "ordinary care." The instruction uses "due care" instead because that is the term used in the statutory affirmative defense applicable to violations of §§ 940.09, 940.25 and 346.63. In cases involving the defense, it would be confusing to refer to "ordinary care" when referring to the victim's conduct and to "due care" when referring to the defendant's conduct. Because "due care" is used in the statute, the term is adopted for both references in this instruction. The Committee does not believe that there is a substantive difference between the two terms.

20. The instruction attempts to articulate a very fine distinction which, in the abstract, may be difficult to understand. "Defense" is used here to refer to a special rule of law providing a defense to the crime. However, in plain language, negligence on the part of the victim can be a reason why the defendant is not guilty of the charge. It could prevent the defendant's conduct from being the cause of the harm, or it could satisfy the requirements of the affirmative defense under § 940.09(2). The third sentence in the bracketed material is intended to address the recommendations in Lohmeier that a "bridging" instruction be drafted. See note 18, supra, and Wis JI-Criminal 2600 Introductory Comment, Sec. X.

21. This statement is included to assure that both options for a not guilty verdict are clearly presented:

1) not guilty because the elements have not been proved [regardless of the conclusion about the defense]; and
2) not guilty even though the elements have been proved, because the defense has been established.

A separate set of closing paragraphs is presented for each count in an attempt to avoid confusion that may result from combining consideration of the two counts and the possible defenses.

22. See note 21, supra.

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1190 HOMICIDE BY OPERATION OR HANDLING OF FIREARM OR AIRGUN WHILE UNDER THE INFLUENCE — § 940.09(1g)(a)

Statutory Definition of the Crime

Section 940.09(1g)(a) of the Criminal Code of Wisconsin is violated by one who causes the death of another by the operation or handling of a firearm[1] while under the influence of an intoxicant.[2]

State's Burden of Proof

Before you may find the defendant guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following three elements were present.

Elements of the Crime That the State Must Prove

1. The defendant handled[3] a firearm.[4]
2. The defendant's handling of a firearm caused the death of (name of victim).

   "Cause" means that the defendant's handling of a firearm was a substantial factor[5] in producing the death.
3. The defendant was under the influence of an intoxicant at the time the defendant handled a firearm.

Definition of "Under the Influence of an Intoxicant"

"Under the influence of an intoxicant" means that the defendant's ability to handle a firearm was materially impaired because of consumption of an alcoholic beverage.[6]

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Not every person who has consumed alcoholic beverages is "under the influence" as that term is used here. What must be established is that the person has consumed a sufficient amount of alcohol to cause the person to be less able to exercise the clear judgment and steady hand necessary to handle a firearm.

It is not required that impaired ability to operate be demonstrated by particular unsafe acts. What is required is that the person's ability to safely handle the firearm be materially impaired.

How to Use the Test Result Evidence

The law states that the alcohol concentration in a defendant's (breath) (blood) (urine) sample taken within three hours of an incident is evidence of the defendant's alcohol concentration at the time of the incident.[7]

WHERE TEST RESULTS SHOWING MORE THAN 0.04 BUT LESS THAN 0.08 GRAMS HAVE BEEN ADMITTED, THE EVIDENCE IS RELEVANT BUT DOES NOT HAVE PRIMA FACIE EFFECT. SEE WIS JI-CRIMINAL 232.[8]

WHERE TEST RESULTS SHOWING 0.08 GRAMS OR MORE HAVE BEEN ADMITTED[9] AND THERE IS NO ISSUE RELATING TO THE DEFENDANT'S POSITION ON THE "BLOOD-ALCOHOL CURVE,"[10] THE JURY SHOULD BE INSTRUCTED AS FOLLOWS:

[If you are satisfied beyond a reasonable doubt that there was [.08 grams or more of alcohol in 100 milliliters of the defendant's blood] [.08 grams or more of alcohol in 210 liters of the defendant's breath] at the time the test was taken, you may find from that fact alone that the defendant was under the influence of an intoxicant at the time of the alleged incident, but you are not required to do so. You the jury are here to decide this question on the basis

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of all the evidence in this case, and you should not find that the defendant was under the influence of an intoxicant at the time of the alleged incident, unless you are satisfied of that fact beyond a reasonable doubt.]

IF AN APPROVED TESTING DEVICE IS INVOLVED, THE FOLLOWING MAY BE ADDED:[11]

[The law recognizes that the testing device used in this case uses a scientifically sound method of measuring the alcohol concentration of an individual. The State is not required to prove the underlying scientific reliability of the method used by the testing device. However, the State is required to establish that the testing device was in proper working order and that it was correctly operated by a qualified person.]

IF THERE IS NO EVIDENCE OF THE DEFENSE DEFINED BY SECTION 940.09(2), USE THE FOLLOWING CLOSING:[12]

[Jury's Decision]

[If you are satisfied beyond a reasonable doubt that all three elements of this offense have been proved, you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.]

IF THERE IS EVIDENCE OF THE DEFENSE DEFINED BY SECTION 940.09(2),[13] USE THE FOLLOWING:

[Consider Whether the Defense is Proved]

[Wisconsin law provides that it is a defense to this crime if the death would have occurred even if the defendant had been exercising due care and had not been under the influence of an intoxicant.

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The burden is on the defendant to prove by evidence which satisfies you to a reasonable certainty by the greater weight of the credible evidence[14] that this defense is established.

"By the greater weight of the evidence" [is meant] [means] evidence which, when weighed against that opposed to it, has more convincing power. "Credible evidence" is evidence which in the light of reason and common sense is worthy of belief.]

ADD THE FOLLOWING IF REQUESTED AND IF EVIDENCE OF THE CONDUCT OF THE VICTIM HAS BEEN INTRODUCED AS RELEVANT TO THE AFFIRMATIVE DEFENSE. DO NOT GIVE WITHOUT CLEAR JUSTIFICATION.[15]

[Evidence has been received relating to the conduct of (name of victim) at the time of the alleged crime. Any failure by (name of victim) to exercise due care[16] does not by itself provide a defense to the crime charged against the defendant.[17] Consider evidence of the conduct of (name of victim) in deciding whether the defendant has established that the death would have occurred even if the defendant had not been under the influence of an intoxicant and had been exercising due care.]

Jury's Decision

[If you are satisfied to a reasonable certainty by the greater weight of the credible evidence that this defense is proved, you must find the defendant not guilty.

If you are not satisfied to a reasonable certainty by the greater weight of the credible evidence that this defense is proved and you are satisfied beyond a reasonable doubt that all elements of this offense have been proved, you should find the defendant guilty.

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If you are not satisfied beyond a reasonable doubt that all elements of this offense have been proved, you must find the defendant not guilty.[18]]

COMMENT

Wis JI-Criminal 1190 was originally published in 1962 and revised in 1980, 1982, 1985, 1986, 1993, 2004, and 2006. This revision was approved by the Committee in February 2014.

This instruction is drafted for violations of § 940.09(1g)(a), causing death while handling a firearm or airgun under the influence an intoxicant. For cases involving the death of an unborn child, see Wis JI-Criminal 1185A which identifies the changes that should be made in the instructions.

The 2006 revision reflected the correction made in § 885.235 by 2005 Wisconsin Act 8. That correction restored statutory authority for giving prima facie effect to test results in cases where the defendant has three or more priors. See Wis JI-Criminal 2600 Introductory Comment, sec. VII.

See Wis JI-Criminal 1191 for the related offense involving an alcohol concentration of 0.08 or more of .08 or more. For cases with two charges under the influence and an alcohol concentration of 0.08 or more Wis JI-Criminal 1189 can be used as a model.

Section 940.09(2) provides that the defendant "has a defense if he or she proves by a preponderance of the evidence that the death would have occurred even if he or she had been exercising due care and he or she had not been under the influence . . ." The defense is addressed in the instruction by using an alternative ending, see text at footnote 13 and following. Regarding the defense, see Wis JI-Criminal 2600, Sec. X.

The 2004 revision adopted a new format for footnotes. Although this offense involves firearms or airguns, the structure of the statute and its terms are the same as apply to motor vehicle offenses. Footnotes common to motor vehicle offenses are collected in the Introductory Comment that precedes Wis JI-Criminal 2600. They are cross-referenced by paragraph number in the footnotes for the individual instructions to which they apply. Footnotes unique to individual instructions are included in full in those instructions.

1. Section 940.09(1g) applies to operation or handling of a "firearm" or "airgun." This instruction is drafted for cases involving a "firearm." "Airgun" is defined by § 939.22(2) as follows:

'Airgun' means a weapon which expels a missile by the expansion of compressed air or other gas.

2. This instruction is drafted for cases involving the influence of an intoxicant, which is defined to include "an alcohol beverage, hazardous inhalant, . . . a controlled substance or controlled substance analog under ch. 961, . . . any combination of an alcohol beverage, hazsardous inhalant, controlled substance and controlled substance analog, or . . . any other drug, or . . . an alcohol beverage and any other drug." See § 939.22(42) in note 6, below. For a model tailored to Motor Vehicle Code offenses involving the influence of a controlled substance, see Wis JI-Criminal 2664. For a model tailored to Motor Vehicle Code offenses involving the combined influence of an intoxicant and a controlled substance, see Wis JI-Criminal 2664A. For a model tailored to Motor Vehicle Code offenses involving a "hazardous inhalant," see Wis JI-Criminal 2667.

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3. The statute applies to the "operation or handling" of a firearm or airgun. The instruction uses "handles" throughout, because the Committee concluded that it is the term that fits best with instrumentalities like firearms and airguns.

4. "Firearm" has been defined as a weapon that acts by force of gunpowder. Rafferty v. State, 29 Wis.2d 470, 478, 138 N.W.2d 741 (1966).

5. The Committee concluded that the simple "substantial factor" definition of cause should be sufficient for most cases. If additional definition is necessary, see note 5, Wis JI-Criminal 1185, and Wis JI-Criminal 901, Cause.

The statute does provide the defendant with an affirmative defense in certain situations, see footnote 12, below.

6. This instruction is drafted for cases involving the influence of an intoxicant. For a model tailored to Motor Vehicle Code offenses involving the influence of a controlled substance, see Wis JI-Criminal 2664. For a model tailored to Motor Vehicle Code offenses involving the combined influence of an intoxicant and a controlled substance, see Wis JI-Criminal 2664A. The definition in the instruction paraphrases the full definition provided in § 939.22(42):

> "Under the influence of an intoxicant" means that the actor's ability to operate a vehicle or handle a firearm or airgun is materially impaired because of his or her consumption of an alcohol beverage, hazardous inhalant, of a controlled substance or controlled substance analog under ch. 961, of any combination of an alcohol beverage, hazardous inhalant, controlled substance and controlled substance analog, or of any other drug or of an alcohol beverage and any other drug.

Note: "hazardous inhalant" was added to the definition in § 939.22(42) by 2013 Wisconsin Act 83 [effective date: Dec. 14, 2013]. Act 83 also created a definition of "hazardous inhalant" in § 939.22(15). For a model tailored to Motor Vehicle Code offenses involving a "hazardous inhalant," see Wis JI-Criminal 2667.

For a discussion of issues relating to the definition of "under the influence," see Wis JI-Criminal 2600 Introductory Comment, Sec. VIII.

7. This statement is supported by the general rule stated in § 885.235(1g) that the results of properly conducted alcohol tests are admissible. However, the rest of that statute does not accord test results of defendants with 3 or more priors any prima facie effect. So there is no statutory authority for the typical statement that discusses the evidentiary value of test results.

8. It may be that cases will be charged under § 940.09(1g)(a) where a test has shown an alcohol concentration of more than 0.04 grams but less than 0.08 grams. Section 885.235(1)(b) provides that a test result in this range "is relevant evidence on intoxication . . . but is not to be given any prima facie effect." Wis JI-Criminal 232 provides an instruction that can be adapted for this situation.

9. Regarding the evidentiary significance of test results, see Wis JI-Criminal 2600 Introductory Comment, Sec. VII.

10. Regarding the "blood alcohol curve," see Wis JI-Criminal 2600 Introductory Comment, Sec. VII.

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11. Regarding the reliability of the testing device, see Wis JI-Criminal 2600 Introductory Comment, Sec. VII.

12. Section 940.09(2) provides that the defendant "has a defense if he or she proves by a preponderance of the evidence that the death would have occurred even if he or she had been exercising due care and he or she had not been under the influence of an intoxicant . . ." When there is not "some evidence" of the defense in the case, this set of closing paragraphs should be used.

13. See note 12, supra. When there is "some evidence" of the defense in the case, the second set of closing paragraphs should be used.

14. Section 940.09(2) expressly places the burden on the defendant to prove the defense "by a preponderance of the evidence." The instruction describes the standard as "to a reasonable certainty, by the greater weight of the credible evidence," because the Committee concluded that "the greater weight" will be more easily understood by the jury than "preponderance."

15. The material that follows was drafted to respond to the recommendations made by the Wisconsin Supreme Court in State v. Lohmeier, 205 Wis.2d 182, 556 N.W.2d 90 (1996). The court recommended that an instruction be drafted to articulate the rule in § 939.14, **Criminal conduct or contributory negligence of victim no defense.** See Wis JI-Criminal 2600 Introductory Comment, Sec. X.

16. The phrase "failure to exercise due care" is intended to refer to what might be characterized as "negligence" on the part of the victim. The Committee concluded that the term "negligence" should not be used because that highlights the conflict with the rule of § 939.14. The usual substitute for "negligence" would be a reference to the failure to exercise "ordinary care." The instruction uses "due care" instead because that is the term used in the statutory affirmative defense applicable to violations of § § 940.09, 940.25 and 346.63. In cases involving the defense, it would be confusing to refer to "ordinary care" when referring to the victim's conduct and to "due care" when referring to the defendant's conduct. Because "due care" is used in the statute, the term is adopted for both references in this instruction. The Committee does not believe that there is a substantive difference between the two terms.

17. The instruction attempts to articulate a very fine distinction which, in the abstract, may be difficult to understand. "Defense" is used here to refer to a special rule of law providing a defense to the crime. However, in plain language, negligence on the part of the victim can be a reason why the defendant is not guilty of the charge. It could prevent the defendant's conduct from being the cause of the harm, or it could satisfy the requirements of the affirmative defense under § 940.09(2). The third sentence in the bracketed material is intended to address the recommendations in Lohmeier that a "bridging" instruction be drafted. See note 15, supra, and Wis JI-Criminal 2600 Introductory Comment, Sec. X.

18. This statement is included to assure that both options for a not guilty verdict are clearly presented:

1) not guilty because the elements have not been proved [regardless of the conclusion about the defense]; and

2) not guilty even though the elements have been proved, because the defense has been established.

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1191 HOMICIDE BY OPERATION OR HANDLING OF FIREARM OR AIRGUN WITH AN ALCOHOL CONCENTRATION OF 0.08 OR MORE — § 940.09(1g)(b)

Statutory Definition of the Crime

Section 940.09(1g)(b) of the Criminal Code of Wisconsin is violated by one who causes the death of another by the operation or handling of a firearm[1] while that person has an alcohol concentration of 0.08 or more.[2]

State's Burden of Proof

Before you may find the defendant guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following three elements were present.

Elements of the Crime That the State Must Prove

1. The defendant handled[3] a firearm.[4]
2. The defendant's handling of a firearm caused the death of (name of victim).

   "Cause" means that the defendant's handling of a firearm was a substantial factor[5] in producing the death.
3. The defendant had an alcohol concentration of 0.08 or more at the time the defendant handled a firearm.

How to Use the Test Result Evidence

The law states that the alcohol concentration in a defendant's (breath) (blood) (urine) sample taken within three hours of an incident is evidence of the defendant's alcohol concentration at the time of the incident.[6]

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WHERE TEST RESULTS SHOWING 0.08 GRAMS OR MORE HAVE BEEN ADMITTED[7] AND THERE IS NO ISSUE RELATING TO THE DEFENDANT'S POSITION ON THE "BLOOD-ALCOHOL CURVE,"[8] THE JURY SHOULD BE INSTRUCTED AS FOLLOWS:

[If you are satisfied beyond a reasonable doubt that there was [.08 grams or more of alcohol in 100 milliliters of the defendant's blood] [.08 grams or more of alcohol in 210 liters of the defendant's breath] at the time the test was taken, you may find from that fact alone that the defendant had an alcohol concentration of .08 or more at the time of the alleged incident, but you are not required to do so. You the jury are here to decide this question on the basis of all the evidence in this case, and you should not find that the defendant had an alcohol concentration of .08 or more at the time of the alleged incident, unless you are satisfied of that fact beyond a reasonable doubt.]

IF AN APPROVED TESTING DEVICE IS INVOLVED, THE FOLLOWING MAY BE ADDED:[9]

[The law recognizes that the testing device used in this case uses a scientifically sound method of measuring the alcohol concentration of an individual. The State is not required to prove the underlying scientific reliability of the method used by the testing device. However, the State is required to establish that the testing device was in proper working order and that it was correctly operated by a qualified person.]

IF THERE IS NO EVIDENCE OF THE DEFENSE DEFINED BY SECTION 940.09(2), USE THE FOLLOWING CLOSING:[10]

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[Jury's Decision]

[If you are satisfied beyond a reasonable doubt that all three elements of this offense have been proved, you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.]

IF THERE IS EVIDENCE OF THE DEFENSE DEFINED BY SECTION 940.09(2),[11] USE THE FOLLOWING:

[Consider Whether the Defense is Proved]

[Wisconsin law provides that it is a defense to this crime if the death would have occurred even if the defendant had been exercising due care and had not had an alcohol concentration of .08 or more.

The burden is on the defendant to prove by evidence which satisfies you to a reasonable certainty by the greater weight of the credible evidence[12] that this defense is established.

"By the greater weight of the evidence" is meant evidence which, when weighed against that opposed to it, has more convincing power. "Credible evidence" is evidence which in the light of reason and common sense is worthy of belief.]

ADD THE FOLLOWING IF REQUESTED AND IF EVIDENCE OF THE CONDUCT OF THE VICTIM HAS BEEN INTRODUCED AS RELEVANT TO THE AFFIRMATIVE DEFENSE. DO NOT GIVE WITHOUT CLEAR JUSTIFICATION.[13]

[Evidence has been received relating to the conduct of (name of victim) at the time of the alleged crime. Any failure by (name of victim) to exercise due care[14] does not by itself provide a defense to the crime charged against the defendant.[15] Consider evidence of the

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conduct of (name of victim) in deciding whether the defendant has established that the death would have occurred even if the defendant had not had an alcohol concentration of .08 or more and had been exercising due care.]

Jury's Decision

[If you are satisfied to a reasonable certainty by the greater weight of the credible evidence that this defense is proved, you must find the defendant not guilty.

If you are not satisfied to a reasonable certainty by the greater weight of the credible evidence that this defense is proved and you are satisfied beyond a reasonable doubt that all elements of this offense have been proved, you should find the defendant guilty.

If you are not satisfied beyond a reasonable doubt that all elements of this offense have been proved, you must find the defendant not guilty.[16]]

COMMENT

Wis JI-Criminal 1191 was originally published in 1982 and revised in 1985, 1986, 1992, and 2004. This revision was approved by the Committee in June 2005.

This instruction is drafted for violations of § 940.09(1g)(b) involving an alcohol concentration of 0.08 or more. The 2004 revision reflected the change in the prohibited alcohol concentration level from 0.10 to 0.08 made by 2003 Wisconsin Act 30. The change applies to all offenses committed on or after September 30, 2003. The prohibited level does not change for this offense where a defendant has prior convictions.

The 2006 revision reflected the correction made in § 885.235 by 2005 Wisconsin Act 8. That correction restored statutory authority for giving prima facie effect to test results in cases where the defendant has three or more priors. See Wis JI-Criminal 2600 Introductory Comment, sec. VII.

For cases involving the death of an unborn child, see Wis JI-Criminal 1185A which identifies the changes that should be made in the instructions.

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See Wis JI-Criminal 1190 for the related offense of causing death by handling a firearm while under the influence, as defined in § 940.09(1g)(a). For cases with two charges — under the influence and an alcohol concentration of .08 or more — Wis JI-Criminal 1189 can be used as a model.

Section 940.09(2) provides that the defendant "has a defense if he or she proves by a preponderance of the evidence that the death would have occurred even if he or she had been exercising due care and he or she . . . did not have an alcohol concentration described under sub. . . . (1g)(b) . . ." The defense is addressed in the instruction by using an alternative ending, see text at footnote 11 and following. Regarding the defense, see Wis JI-Criminal 2600, Sec. X.

The 2004 revision adopted a new format for footnotes. Although this offense involves firearms or airguns, the structure of the statute and its terms are the same as apply to motor vehicle offenses. Footnotes common to motor vehicle offenses are collected in the Introductory Comment that precedes Wis JI-Criminal 2600. They are cross-referenced by paragraph number in the footnotes for the individual instructions to which they apply. Footnotes unique to individual instructions are included in full in those instructions.

1. Section 940.09(1g) applies to operation or handling of a "firearm" or "airgun. This instruction is drafted for cases involving a "firearm." "Airgun" is defined by § 939.22(2) as follows:

'Airgun' means a weapon which expels a missile by the expansion of compressed air or other gas.

2. Section 940.09(1g)(b) defines this offense as causing death by operation or handling a vehicle "while the person has an alcohol concentration of 0.08 or more." Unlike motor vehicle offenses, the prohibited level does not change if the defendant has prior convictions.

3. The statute applies to the "operation or handling" of a firearm or airgun. The instruction uses "handles" throughout, on the assumption that it is the term that fits best with instrumentalities like firearms and airguns.

4. "Firearm" has been defined as a weapon that acts by force of gunpowder. Rafferty v. State, 29 Wis.2d 470, 478, 138 N.W.2d 741 (1966).

5. The Committee concluded that the simple "substantial factor" definition of cause should be sufficient for most cases. If additional definition is necessary, see note 5, Wis JI-Criminal 1185, and Wis JI-Criminal 901, Cause.

The statute does provide the defendant with an affirmative defense in certain situations, see footnote 10, below.

6. This statement is supported by the general rule stated in § 885.235(1g) that the results of properly conducted alcohol tests are admissible. However, the rest of that statute does not accord test results of defendants with 3 or more priors any prima facie effect. So there is no statutory authority for the typical statement that discusses the evidentiary value of test results.

7. Regarding the evidentiary significance of test results, see Wis JI-Criminal 2600 Introductory Comment, Sec. VII.

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8. Regarding the "blood alcohol curve," see Wis JI-Criminal 2600 Introductory Comment, Sec. VII.

9. Regarding the reliability of the testing device, see Wis JI-Criminal 2600 Introductory Comment, Sec. VII.

10. Section 940.09(2) provides that the defendant "has a defense if he or she proves by a preponderance of the evidence that the death would have occurred even if he or she had been exercising due care and he or she . . . did not have a prohibited alcohol concentration . . ." When there is not "some evidence" of the defense in the case, this set of closing paragraphs should be used.

11. See note 10, supra. When there is "some evidence" of the defense in the case, the second set of closing paragraphs should be used.

12. Section 940.09(2) expressly places the burden on the defendant to prove the defense "by a preponderance of the evidence." The instruction describes the standard as "to a reasonable certainty, by the greater weight of the credible evidence," because the Committee concluded that "the greater weight" will be more easily understood by the jury than "preponderance."

13. The material that follows was drafted to respond to the recommendations made by the Wisconsin Supreme Court in State v. Lohmeier, 205 Wis.2d 182, 556 N.W.2d 90 (1996). The court recommended that an instruction be drafted to articulate the rule in § 939.14, **Criminal conduct or contributory negligence of victim no defense.** See Wis JI-Criminal 2600 Introductory Comment, Sec. X.

14. The phrase "failure to exercise due care" is intended to refer to what might be characterized as "negligence" on the part of the victim. The Committee concluded that the term "negligence" should not be used because that highlights the conflict with the rule of § 939.14. The usual substitute for "negligence" would be a reference to the failure to exercise "ordinary care." The instruction uses "due care" instead because that is the term used in the statutory affirmative defense applicable to violations of §§ 940.09, 940.25 and 346.63. In cases involving the defense, it would be confusing to refer to "ordinary care" when referring to the victim's conduct and to "due care" when referring to the defendant's conduct. Because "due care" is used in the statute, the term is adopted for both references in this instruction. The Committee does not believe that there is a substantive difference between the two terms.

15. The instruction attempts to articulate a very fine distinction which, in the abstract, may be difficult to understand. "Defense" is used here to refer to a special rule of law providing a defense to the crime. However, in plain language, negligence on the part of the victim can be a reason why the defendant is not guilty of the charge. It could prevent the defendant's conduct from being the cause of the harm, or it could satisfy the requirements of the affirmative defense under § 940.09(2). The third sentence in the bracketed material is intended to address the recommendations in Lohmeier that a "bridging" instruction be drafted. See note 13, supra, and Wis JI-Criminal 2600 Introductory Comment, Sec. X.

16. This statement is included to assure that both options for a not guilty verdict are clearly presented:

1) not guilty because the elements have not been proved [regardless of the conclusion about the defense]; and

2) not guilty even though the elements have been proved, because the defense has been established.

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1193 MUTILATING A CORPSE — § 940.11(1)

Statutory Definition of the Crime

Section 940.11(1) of the Criminal Code of Wisconsin is violated by one who mutilates, disfigures, or dismembers a corpse with intent to conceal a crime or avoid apprehension, prosecution, or conviction for a crime.

State's Burden of Proof

Before you may find the defendant guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following two elements were present.

Elements of the Crime That the State Must Prove

1. The defendant (mutilated) (disfigured) (dismembered) a corpse.[1]
2. The defendant (mutilated) (disfigured) (dismembered) a corpse with the intent to [conceal a crime] [avoid apprehension, prosecution, or conviction[2] for a crime].

   This requires that the defendant acted with the purpose to [conceal a crime] [avoid apprehension, prosecution, or conviction for a crime].[3]

Deciding About Intent

You cannot look into a person's mind to find out intent. Intent must be found, if found at all, from the defendant's acts, words, ands statements, if any, and from all the facts and circumstances in this case bearing upon intent.

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Jury's Decision

If you are satisfied beyond a reasonable doubt that both elements of this offense have been proved, you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.

COMMENT

Wis JI-Criminal 1193 was originally published in 1998. This revision was approved by the Committee in April 2006 and involved adoption of a new format and nonsubstantive changes to the text.

This instruction is for violations of sub. (1) of § 940.11. For violations of sub. (2) of the same statute, see Wis JI-Criminal 1194.

Subsection (3) of § 940.11 provides as follows: "A person may not be subject to prosecution under both this section and §946.47 for his or her acts regarding the same corpse." Section 946.47 defines the offense of Harboring Or Aiding Felons.

1. "Corpse" means the dead body of a human being. American Heritage Dictionary of the English Language, 3rd Edition, 1992.

2. If the charging document specifies one of the alternatives (apprehension, prosecution, or conviction), or the evidence supports only one, only that alternative should be used in the instruction. If more than one alternative is supported by the evidence and included in the instruction, the Committee concluded that the jury need not be unanimous as to which applies because the alternatives do not state "conceptually distinct" categories. For a discussion of the same problem arising in connection with burglary with intent to commit a felony, see State v. Hammer, 216 Wis.2d 213, 576 N.W.2d 285 (Ct. App. 1997).

3. "With intent to" is defined in § 939.23(4) as having the mental purpose to cause the result or being "aware that his or her conduct is practically certain to cause that result." The Committee believes that the mental purpose alternative is most likely to apply to this offense. Also see Wis JI-Criminal 923A and 923B.

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1194 HIDING OR BURYING A CORPSE — § 940.11(2)

Statutory Definition of the Crime

Section 940.11(2) of the Criminal Code of Wisconsin is violated by one who hides or buries a corpse [with intent to conceal a crime or avoid apprehension, prosecution, or conviction for a crime] [with intent to collect benefits under section (49.141) (49.49) (49.795)].[1]

State's Burden of Proof

Before you may find the defendant guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following two elements were present.

Elements of the Crime That the State Must Prove

1. The defendant (hid)[2] (buried) a corpse.[3]
2. The defendant (hid) (buried) a corpse with intent to [conceal a crime] [avoid apprehension, prosecution, or conviction[4] for a crime] [to collect benefits under section (49.141) (49.49) (49.795)].

   This requires that the defendant acted with the purpose to [conceal a crime] [avoid apprehension, prosecution, or conviction for a crime] [to collect benefits under section (49.141) (49.49) (49.795)].[5]

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Deciding About Intent

You cannot look into a person's mind to find out intent. Intent must be found, if found at all, from the defendant's acts, words, ands statements, if any, and from all the facts and circumstances in this case bearing upon intent.

Jury's Decision

If you are satisfied beyond a reasonable doubt that both elements of this offense have been proved, you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.

COMMENT

Wis JI-Criminal 1194 was originally published in 1994 and revised in 1998 and 2006. This revision was approved by the Committee in July 2012; it revised the instruction to reflect changes made by 2011 Wisconsin Act 268.

This instruction is for violations of sub. (2) of § 940.11. For violations of sub. (1) of the same statute, see Wis JI-Criminal 1193.

Section 940.11 was amended by 2011 Wisconsin Act 268 [effective date: April 24, 2012] to add an alternative intent element: intent to collect benefits under sections 49.141 Wisconsin works, 49.49 Medical assistance or 49.795 Food stamps.

Subsection (3) of § 940.11 provides as follows: "A person may not be subject to prosecution under both this section and § 946.47 or under both this section and § 948.23 for his or her acts regarding the same corpse." Section 946.47 defines the offense of Harboring Or Aiding Felons. Section 948.23 defines the offense of Concealing or Not Reporting the Death of a Child.

1. This alternative intent element was added to § 940.11(2) by 2011 Wisconsin Act 268 [effective date: April 24, 2012]. Section 49.141 refers to benefits under Wisconsin Works, 49.49 refers to medical assistance, and 49.795 refers to food stamps.

The material added to the statute by Act 268 reads: ". . . or notwithstanding s. 49.141(7), 49.49(1), or 49.795 with intent to collect benefits under one of those sections. . ." The statutes listed after "notwithstanding" are those that define criminal violations — what are typically referred to as "welfare fraud" or "food stamp fraud." The Committee interpreted this reference to mean that regardless of the other criminal penalties that may apply, an individual may be prosecuted under § 940.11 if the statute is violated with an intent to obtain benefits under those sections.

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2. The evidence was found to be sufficient to establish that the defendant "hid" a corpse in State v. Badker, 2001 WI App 27, 240 Wis.2d 460, 623 N.W.2d 142. The court referred with apparent approval to the dictionary definition of "hide" as "to put or keep out of sight." 2001 WI App 27, ¶25, citing Webster's II New College Dictionary (1999).

3. "Corpse" means the dead body of a human being. American Heritage Dictionary of the English Language, 3rd Edition, 1992.

4. If the charging document specifies one of the alternatives (apprehension, prosecution, or conviction), or the evidence supports only one, only that alternative should be used in the instruction. If more than one alternative is supported by the evidence and included in the instruction, the Committee concluded that the jury need not be unanimous as to which applies because the alternatives do not state "conceptually distinct" categories. For a discussion of the same problem arising in connection with burglary with intent to commit a felony, see State v. Hammer, 216 Wis.2d 213, 576 N.W.2d 285 (Ct. App. 1997).

5. "With intent to" is defined in § 939.23(4) as having the mental purpose to cause the result or being "aware that his or her conduct is practically certain to cause that result." The Committee believes that the mental purpose alternative is most likely to apply to this offense. Also see Wis JI-Criminal 923A and 923B.

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1195 ASSISTING SUICIDE — § 940.12

Statutory Definition of the Crime

Assisting suicide, as defined in § 940.12 of the Criminal Code of Wisconsin, is committed by one who with intent that another take his own life assists that person to commit suicide.

State's Burden of Proof

Before you may find the defendant guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following three elements were present.

Elements of the Crime That the State Must Prove

1. (Name of deceased) committed suicide.[1]

   The term "suicide" means the voluntary and intentional taking of one's own life.[2]

2. The defendant assisted (name of deceased) in committing suicide.

   "Assisted" means that the defendant in some method or manner helped or aided (name of deceased) to commit suicide.[3] It is not necessary that the defendant was at the scene of the suicide at the time it occurred.[4]

3. The defendant gave assistance to (name of deceased) with intent that (name of deceased) take his own life.

   "With intent that" means that the defendant had the purpose that (name of deceased) commit suicide or that the defendant was aware that (his) (her) conduct was practically certain to cause (name of deceased) to commit suicide.[5]

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Deciding About Intent

You cannot look into a person's mind to find out intent. Intent must be found, if found at all, from the defendant's acts, words, ands statements, if any, and from all the facts and circumstances in this case bearing upon intent.

Jury's Decision

If you are satisfied beyond a reasonable doubt that all three elements of this offense have been proved, you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.

COMMENT

Wis JI-Criminal 1195 was originally published in 1974 and revised in 1977 and 1991. This revision was approved by the Committee in April 2006 and involved adoption of a new format and nonsubstantive changes to the text.

An "assisting suicide" statute from the State of Washington was upheld against a constitutional challenge in Washington v. Glucksberg, 521 U.S. 702 (1997). The court found no constitutional basis for a right to commit suicide or, by implication, to assistance in doing so.

1. Assisting an unsuccessful attempt at suicide would be punishable under the general attempt section, Wis. Stat. § 939.32. See Platz, "The Criminal Code," 1956 Wis. L. Rev. 350, 371 (1956).

2. Bisenius v. Karns, 42 Wis.2d 42, 52, 165 N.W.2d 377 (1969).

3. See 4A Words and Phrases, Assist; Black's Law Dictionary 155 (rev. 4th ed. 1968); Webster's Third New International Dictionary 132 (unabridged ed. 1961).

4. Volume V, 1953 Judiciary Committee Report on the Criminal Code, Wisconsin Legislative Council, p. 65 (February 1953).

5. "With intent that" is defined in § 939.23(4). Also see Wis JI-Criminal 923A and 923B.

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1200-1219 SEXUAL ASSAULT INSTRUCTIONS: INTRODUCTORY COMMENT

[WITHDRAWN]

COMMENT

Wis JI-Criminal 1200-1219, Sexual Assault Instructions Introductory Comment, was originally published in 1980. It was withdrawn in 1990.

This Introductory Comment was withdrawn because the issues it discussed have been addressed by statutory changes or are now adequately covered in the footnotes to individual instructions. Its primary purpose was to discuss the Wisconsin sexual assault statute, which represented a great change from the traditional law of "rape" at the time it was created in 1976. (See Chapter 184, Laws of 1975.) Judges and lawyers are now familiar with the sexual assault law, leading the Committee to conclude that the general discussion previously found in the Introductory Comment was no longer necessary.

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1200A SEXUAL CONTACT — § 940.225(5)(b)

SELECT ONE OF THE FOLLOWING ALTERNATIVES RELATING TO THE TYPE OF SEXUAL CONTACT AND INSERT IT IN THE INSTRUCTION FOR THE SEXUAL ASSAULT OFFENSE.[1]

Meaning of "Sexual Contact"

FOR SEXUAL CONTACT INVOLVING INTENTIONAL TOUCHING OF THE INTIMATE PARTS OF THE VICTIM:

[Sexual contact is an intentional touching of the (name intimate part)[2] of (name of victim) (by the defendant) (by another person upon the defendant's instruction)[3]. The touching may be of the (name intimate part) directly or it may be through the clothing. The touching may be done by any body part or by any object, but it must be an intentional touching.

Sexual contact also requires that the defendant acted with intent to (cause bodily harm to (name of victim).)[4] (become sexually aroused or gratified.) (sexually degrade or humiliate (name of victim).)[5]]

FOR SEXUAL CONTACT INVOLVING INTENTIONAL TOUCHING BY THE VICTIM OF THE INTIMATE PARTS OF THE DEFENDANT OR OF ANOTHER PERSON:

[Sexual contact is a touching by (name of victim) of the (name intimate part)[6] (of the defendant) (of another person upon the defendant's instruction)[7], if the defendant intentionally caused[8] (name of victim) to do that touching. The touching may be of the (name intimate part) directly or it may be through the clothing.

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Sexual contact also requires that the defendant acted with intent to (cause bodily harm to (name of victim).)[9] (become sexually aroused or gratified.) (sexually degrade or humiliate (name of victim).)[10]]

FOR SEXUAL CONTACT INVOLVING INTENTIONAL EJACULATION OR INTENTIONAL EMISSION OF URINE OR FECES UPON THE COMPLAINANT:

[Sexual contact is intentional penile ejaculation of ejaculate or intentional emission of urine or feces (by the defendant) (by another person upon the defendant's instruction)[11] upon any part of the body clothed or unclothed of (name of victim).[12]

Sexual contact also requires that the defendant acted with intent to (become sexually aroused or gratified.) (sexually degrade or humiliate (name of victim).)[13]]

FOR SEXUAL CONTACT INVOLVING INTENTIONALLY CAUSING THE VICTIM TO EJACULATE OR EMIT URINE OR FECES ON ANY PART OF THE DEFENDANT'S BODY:

[Sexual contact is ejaculation or emission of urine or feces by (name of victim) on any part of the defendant's body, clothed or unclothed, which the defendant intentionally causes.[14]

Sexual contact also requires that the defendant acted with intent to (become sexually aroused or gratified.) (sexually degrade or humiliate (name of victim).)[15]]

GIVE THE FOLLOWING IN ALL CASES.

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Deciding About Intent

You cannot look into a person's mind to find intent. Intent must be found, if found at all, from the defendant's acts, words, and statements, if any, and from all the facts and circumstances bearing upon intent.

CONTINUE WITH THE INSTRUCTION FOR THE SEXUAL ASSAULT OFFENSE.

COMMENT

Wis JI-Criminal 1200A was originally published in 1996 and revised in 1999, 2001, 2002, and 2003. This revision was approved by the Committee in October 2006; it reflected changes made by 2005 Wisconsin Acts 273 and 435.

[An instruction formerly numbered Wis JI-Criminal 1200A, FIRST DEGREE SEXUAL ASSAULT: SEXUAL INTERCOURSE CAUSING PREGNANCY, has been renumbered Wis JI-Criminal 1201A.]

This instruction provides definitions of "sexual contact" that are to be integrated into the instruction for sexual assault offenses involving sexual contact as appropriate to the facts of the case. The material provided here was formerly included in the text of each offense instruction, dividing the sexual contact definition into two separate elements: one involving the type of touching; the other involving the purpose of the touching. When a new alternative was added to the statutory definition of sexual contact by 1995 Wisconsin Act 69, the Committee decided to modify its original approach by providing this separate instruction with all the alternatives for both the type of touching and the purpose of the touching. The Committee believes that this will be more convenient to the users of the instructions, making it easier to prepare an instruction that is tailored to the facts of the case.

A similar instruction is provided at Wis JI-Criminal 2101A for offenses in violation of § 948.02. This instruction differs in several ways, due to differences between the statutory definition of "sexual contact" provided in § 940.225(5)(b), addressed in this instruction, and the definition of the same term provided in § 948.01(5), addressed in Wis JI-Criminal 2101A. This instruction should be used only for violations of § 940.225.

The following definition of "sexual contact" is provided in § 940.225(5)(b), as amended by 2005 Wisconsin Acts 273 and 435 (effective date: June 6, 2006):

(b) "Sexual contact" means any of the following:

1. Any of the following types of intentional touching whether direct or through clothing if that intentional touching is either for the purpose of sexually degrading; or for the purpose of sexually humiliating the complainant or sexually arousing or gratifying the defendant or if the touching contains the elements of actual or attempted battery under s. 940.19 (1):

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a. Intentional touching by the defendant or, upon the defendant's instruction, by another person, by the use of any body part or object, of the complainant's intimate parts.

b. Intentional touching by the complainant, by the use of any body part or object, of the defendant's intimate parts or, if done upon the defendant's instructions, the intimate parts of another person.

2. Intentional penile ejaculation of ejaculate or intentional emission of urine or feces by the defendant or, upon the defendant's instruction, by another person upon any part of the body clothed or unclothed of the complainant if that ejaculation or emission is either for the purpose of sexually degrading or sexually humiliating the complainant or for the purpose of sexually arousing or gratifying the defendant.

3. For the purpose of sexually degrading or humiliating the complainant or sexually arousing or gratifying the defendant, intentionally causing the complainant to ejaculate or emit urine or feces on any part of the defendant's body, whether clothed or unclothed.

1. The definition of "sexual contact" in § 940.225(5)(b) identifies two types of intentional touchings and two alternatives involving intentional emission of bodily substances. The instruction provides separate alternatives for each alternative, one of which should be selected and added to the instruction for the sexual assault offense.

Each alternative includes the second part of the statutory sexual contact definition: that the contact was for a prohibited purpose. See note 5, below.

2. Section 939.22(19) defines "intimate parts": "'Intimate parts' means the breast, buttock, anus, groin, scrotum, penis, vagina, or pubic mound of a human being." The Committee suggests naming the specific intimate part involved in the sexual contact.

In State v. Morse, 126 Wis.2d 1, 374 N.W.2d 388 (Ct, App. 1985), the court of appeals held that a trial court did not improperly broaden the scope of the sexual contact definition in § 939.22(19) by defining "intimate part" to include "the vaginal area."

"[T]he plain language of Wis. Stat. § 939.22(19) is meant to include a female and a male breast because each is 'the breast . . . of a human being' and thereby the touching of a [15 year old] boy's breast constitutes 'sexual contact' within the meaning of Wis. Stat. §948.02(2)." State v. Forster , 2003 WI App 29, 260 Wis.2d 149, 659 N.W.2d 144.

3. "By another person upon the defendant's instruction" was added by 2005 Wisconsin Act 435, effective date: June 6, 2006.

4. Note that this alternative — intent to cause bodily harm — is not to be used for cases based on sexual contact involving intentional ejaculation or intentional emission of urine or feces. The remaining two intent alternatives do apply to that type of case.

"Intent to cause bodily harm" is derived from that part of the statutory sexual contact definition which prohibits touchings which "contain the elements of actual or attempted battery as defined in § 940.19(1)." The elements of battery are: (1) that the defendant caused bodily harm to another person; (2) that the defendant intended to cause bodily harm; (3) that the bodily harm was caused without the consent of the victim; and (4) that the defendant knew the victim did not consent. [See Wis JI-Criminal 1220.] Attempted

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battery requires proof of intent to commit all the elements of battery and an unequivocal act indicating that intent. (See Wis JI-Criminal 580.)

There is some difficulty in smoothly integrating the elements of battery, or attempted battery, into sexual contact offenses under § 940.225. The Committee determined that the essential element of battery or attempted battery that carries over to sexual contact offenses is that of intent to cause bodily harm.

The actual causing of bodily harm by the defendant (the first element of battery, supra) would be implicated only where offenses under § 940.225(1)(a) (see Wis JI-Criminal 1201) and 940.225(2)(b) (see Wis JI-Criminal 1211) are charged. In both offenses, the causing of bodily harm would be covered by other elements of the crime: with subsection (1)(a), the causing of great bodily harm would include it; with subsection (2)(b), the causing of injury, illness, etc., would include it.

For other sexual contact offenses, the causing of physical injury is not a required element. Therefore, these offenses would probably involve the elements of attempted battery. The Committee feels that the elements of a criminal attempt are established by including "intent to do bodily harm" as an element of the sexual contact offense. The "intentional touching" that is required for all sexual contact offenses would furnish the "unequivocal act" required for a criminal attempt. The requirement that intent to do bodily harm be proved fulfills the other element of a criminal attempt, that the defendant intend to commit the completed crime.

The other two elements of battery and attempted battery require that the victim not consent to the touching and that the defendant know of this fact. However, not all sexual assaults have "without consent" as an element (see § 940.225(1)(d) and (2)(c) through (e)). In these instances, the legislature has apparently made the decision that the consent of the victim should be irrelevant because of the victim's young age, mental disability, or unconsciousness. In these cases, the Committee concluded that the reference to the "elements of battery or attempted battery" should not be read to overrule the sexual assault subsections that do not require that "without consent" be proved.

If the "without consent" element is interpreted in this way, the only essential element of battery and attempted battery that carries over to the sexual contact offenses is the element of "intent to cause bodily harm." The Committee determined that it was better to select this distinctive element and make it an element of sexual contact offenses than to incorporate all the elements of battery or attempted battery into the instructions.

5. Each alternative definition includes the requirement that the contact be for a prohibited purpose. Earlier versions of the instructions included the purpose as a separate element, but the Committee concluded that it was preferable to deal with purpose as a second part of the sexual contact definition. The Committee also concluded that including purpose as part of each alternative will reduce the possibility that it would be inadvertently overlooked. Failure to include the purpose of the contact as a part of the jury instruction is reversible error. State v. Krueger, 2001 WI App 14, 240 Wis.2d 644, 623 N.W.2d 211. Likewise, failure to include reference to purpose when accepting a guilty plea may be grounds for withdrawal of the plea. State v. Bollig, 2000 WI 6, 232 Wis.2d 561, 605 N.W.2d 199; State v. Jipson, 2003 WI App 222, 267 Wis.2d 467, 671 N.W.2d 18; and, State v. Nichelson, 220 Wis.2d 214, 582 N.W.2d 460 (1998).

The instruction phrases the alternatives as requiring that the defendant acted "with intent to" achieve one of the prohibited results. The statute refers to acting with "the purpose of . . ." No change in meaning is intended.

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6. See note 2, supra.

7. "Of another person upon the defendant's instruction" was added by 2005 Wisconsin Act 435, effective date: June 6, 2006.

8. The instruction refers to the touching of the defendant by the complainant as a touching which the defendant "causes" the complainant to do. The statute does not expressly provide for the "causing" alternative, but the Committee concluded that the requirement is implicit.

For sexual assault offenses against children, another alternative exists for this type of sexual contact: allowing a child to touch an intimate part of the defendant. This alternative was recognized in State v. Traylor, 170 Wis.2d 393, 489 N.W.2d 626 (Ct. App. 1992). See the discussion in note 5, Wis JI-Criminal 2101A. Under § 940.225, certain adult victims are in a situation very similar to that of a child victim: persons suffering from mental illness or deficiency [sub. (2)(c)]; persons under the influence of an intoxicant [sub. (2)(cm)]; or, patients or residents [sub. (2)(g)]. However, the Committee decided not to incorporate the "or allowed" alternative in this instruction in the absence of clear authority extending the Traylor decision beyond offenses against children.

Applied literally to a case where the victim is caused to touch the defendant, § 940.225(5)(b)1.b. requires an "intentional touching by the complainant . . . of the . . . defendants' intimate parts. . . ." The Committee concluded that it is proper to interpret this definition in a manner that focuses on the defendant's, rather than the victim's, intent. Thus, the instruction refers simply to "a touching" by the victim that the defendant "intentionally caused." This is consistent with the Traylor decision's interpretation of almost identical language in the definition of "sexual contact" in § 948.01(5)(a).

The constitutionality of the sexual contact definition (prior to its amendment by Chapter 309, Laws of 1981) was considered by the Wisconsin courts in several cases. The constitutionality of the basic definition was upheld in State ex rel. Skinkis v. Treffert, 90 Wis.2d 528, 280 N.W.2d 316 (Ct. App. 1979). In State v. Nye, 105 Wis.2d 63, 312 N.W.2d 826 (1981), the Wisconsin Supreme Court summarily affirmed a Wisconsin Court of Appeals decision (101 Wis.2d 398, 302 N.W.2d 83 (Ct. App. 1981)) which held that it was error to include in a jury instruction the former statutory language "if that touching can reasonably be construed to be for the purpose of sexual arousal or gratification." Chapter 309, Laws of 1981, eliminated the phrase from § 940.225(5)(b); the standard instructions had never included it in the definition of sexual contact.

9. Note that this alternative — intent to cause bodily harm — is not to be used for cases based on sexual contact involving intentional ejaculation or intentional emission of urine of feces. The remaining two alternatives do apply to that type of case. See note 4, supra.

10. See notes 4 and 5, supra.

11. "By another person upon the defendant's instruction" was added by 2005 Wisconsin Act 435, effective date: June 6, 2006.

12. This is the type of "sexual contact" defined in sub. (5)(b)2. of § 940.225. It was created by 1995 Wisconsin Act 69, which first applies to offenses committed on December 2, 1995.

13. See notes 4 and 5, supra.

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14. This is the type of "sexual contact" defined in sub. (5)(b)3. of § 940.225. It was created by 2005 Wisconsin Act 273, which first applies to offenses committed on April 20, 2006.

15. See notes 4 and 5, supra.

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1200B SEXUAL INTERCOURSE — § 940.225(5)(c)

Meaning of "Sexual Intercourse"

INSERT THE ALTERNATIVE[S] SUPPORTED BY THE EVIDENCE INTO THE INSTRUCTION ON THE SEXUAL ASSAULT OFFENSE.

["Sexual intercourse" means any intrusion, however slight, by any part of a person's body or of any object, into the genital or anal opening of another. Emission of semen is not required.][1]

["Sexual intercourse" includes (cunnilingus) (fellatio).

(Cunnilingus means oral contact with the clitoris or vulva.)[2]

(Fellatio means oral contact with the penis.)[3]]

ADD THE FOLLOWING IF SUPPORTED BY THE EVIDENCE.

[The act of sexual intercourse must be either by the defendant or upon the defendant's instruction.][4]

["Sexual intercourse" does not include an intrusion for a bona fide medical, health care, or hygiene procedure.][5]

COMMENT

Wis JI-Criminal 1200B was originally published in 1996 and revised in 2000 and 2006. This revision added to the text at footnote 5 and was approved by the Committee in February 2010.

[An instruction formerly numbered Wis JI-Criminal 1200B, "Without Consent" — Competency to Give Informed Consent in Issue, has been renumbered Wis JI-Criminal 1200C.]

The definitions provided here were formerly provided in each instruction for a sexual assault offense involving sexual intercourse. The 1996 revision combined sexual contact and sexual intercourse offenses into one instruction, making it necessary to refer to this instruction for definition of "sexual intercourse" and to Wis JI-Criminal 1200A for definition of "sexual contact."

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The 2006 revision changed the definitions of "cunnilingus" and "fellatio." See footnotes 2 and 3.

1. Section 940.225(5)(c) defines "sexual intercourse" for purposes of the Sexual Assault Law as follows:

> "Sexual intercourse" includes the meaning assigned under § 939.22(36) as well as cunnilingus, fellatio or anal intercourse between persons or any other intrusion, however slight, of any part of a person's body or of any object into the genital or anal opening either by the defendant or upon the defendant's instruction. The emission of semen is not required.

Section 939.22(36) defines "sexual intercourse" as follows: "'Sexual intercourse' requires only vulvar penetration and does not require emission." Thus the Sexual Assault Law definition begins with the relatively narrow definition in § 939.22(36) and broadens it considerably. The instruction begins with the broader definition, "any . . . intrusion . . .," since the § 939.22(36) definition is clearly contained therein.

2. This definition was revised in 2006 in light of the decision in State v. Harvey, 2006 WI App. 26, 289 Wis.2d 222, 710 N.W.2d 482, which held that defining cunnilingus as "oral stimulation . . ." is not required by the "statutory scheme of the sexual assault law" and "offends the principles underpinning the sexual assault law." Par. 14. The former definition was taken from Webster's New Collegiate Dictionary, but the court of appeals held that "a standard dictionary definition should not by default become the legal definition of a term if it unfairly or inaccurately states the law or misconveys the legislative intent." Par. 17. The court stated: "We think a better resource is BLACK'S LAW DICTIONARY 380 (6th ed. 1990) which more neutrally defines cunnilingus as '[a]n act of sex committed with the mouth and the female sexual organ.'" Par. 17. The Committee decided not to use that definition because it refers to a "sex act," which is inconsistent with the emphasis of Harvey that a purpose of the sexual assault law was to recognize that sexual assaults were crimes of violence, not of sexual passion. Par. 15. As noted in the Harvey decision, the current edition of Black's does not define the term. [See Par. 17, footnote 6.] The Committee believes the revised definition in the instruction is faithful to the substance of the Harvey decision.

3. This definition was revised in 2006 in light of the decision in State v. Harvey, 2006 WI App. 26, see note 2, supra. Harvey was concerned only with the definition of "cunnilingus," but the Committee concluded that the logic of the court's analysis would also apply to defining fellatio as "oral stimulation," which the instruction formerly did. The former definition had been approved in State v. Childs, 146 Wis.2d 116, 430 N.W.2d 353 (Ct. App. 1988).

4. In State v. Olson, 2000 WI APP 158, 238 Wis.2d 74, 616 N.W.2d 144, the court construed the definition provided in § 948.01(6) to require that "the defendant has to either affirmatively perform one of the actions on the victim, or instruct or direct the victim to perform one of them on him- or herself." Olson, ¶10. The Committee concluded that the same interpretation applies to the definition in § 940.225(5)(c) and that the bracketed sentence in the instruction adequately addresses the Olson requirement. The Olson decision also implies that "allowing" the sexual intercourse to take place may also satisfy the statute (see ¶12), but the holding is limited to the "upon the defendant's instruction" issue.

In State v. Lackershire, 2007 WI 74, 288 Wis.2d 609, 707 N.W.2d 891, the court held there was a defect in establishing a factual basis for a guilty plea to second degree sexual assault of a child, where the defendant claimed to be the victim of a sexual assault by the "child." The court held that being a victim constitutes a defense and that the trial court should have explored that issue as part of the factual basis inquiry: ". . . If

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the defendant was raped, the act of having sexual intercourse with a child does not constitute a crime. § 948.01(6)." ¶29. The court relied on State v. Olson, supra, to conclude that the entire definition in § 948.01(6) is modified by the phrase "by the defendant or upon the defendant's instruction." Thus, sexual intercourse resulting from being forced to engage in it by the other party is not "by the defendant or upon the defendant's instruction." The Committee concluded the same interpretation must apply to the definition in § 940.225(5)(c), applicable to prosecutions under § 940.225.

5. This statement is based on the decision in State v. Neumann, 179 Wis.2d 687, 508 N.W.2d 54 (Ct. App. 1993). The court of appeals construed the definition of "sexual intercourse" in § 940.225(5)(c) narrowly in rejecting the defendant's claim that the definition was overbroad: "Although his argument is based on the literal language of the statute, it stretches all bounds of reason to believe that the legislature intended to include bona fide medical, health care, and hygiene procedures within the definition of 'sexual intercourse.'" Neumann, 179 Wis.2d 687, 712, n. 14. Also see State v. Lesik, 2010 WI App 12, ___ Wis.2d ___, ___ N.W.2d ___, [2008 AP 3072-CR], reaching the same conclusion with respect to the definition of "sexual intercourse" applicable to prosecutions under § 948.02.

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1200C "WITHOUT CONSENT" — COMPETENCE TO GIVE INFORMED CONSENT IN ISSUE — § 940.225(4)

CAUTION: THIS INSTRUCTION APPLIES ONLY TO SEXUAL ASSAULT OFFENSES UNDER SECTION 940.225.

SUBSTITUTE THE FOLLOWING[1] FOR THE STANDARD DEFINITION OF "WITHOUT CONSENT" WHEN THE VICTIM'S BEING "COMPETENT TO GIVE INFORMED CONSENT" IS AN ISSUE IN THE CASE.

Meaning of "Did Not Consent"[2]

"Did not consent" means that (name of victim) did not freely agree to have sexual [contact] [intercourse] with the defendant or that (name of victim) was not competent to give informed consent. In deciding whether (name of victim) did not consent, you should consider what (name of victim) said and did, along with all the other facts and circumstances. This element does not require that (name of victim) offered physical resistance.[3]

A person is not competent to give informed consent if that person does not have the mental capacity to understand the nature and the consequence of having sexual (intercourse) (contact).[4] The burden is on the State to satisfy you by proof beyond a reasonable doubt that (name of victim) was not competent to give informed consent.

COMMENT

This instruction was originally published as Wis JI-Criminal 1200B in 1983 and revised in 1990. It was revised and renumbered as Wis JI-Criminal 1200C in 1996. This revision adopted a new format and was approved by the Committee in December 2001.

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The substance of this instruction was originally included in the body of each standard instruction to which it was relevant. It has been placed in a separate instruction in the interest of simplifying the instructions for the various sexual assault offenses.

1. This instruction is designed to implement § 940.225(4) which defines "consent" as "words or overt actions by a person who is competent to give informed consent indicating a freely given agreement to have sexual intercourse or sexual contact." (Emphasis added.) It should be substituted for the entire "without consent" definition found in the individual sexual assault instructions, in cases where the evidence supports its use.

The standard definition of "without consent" found in the sexual assault jury instructions does not include the "competent to give informed consent" material. The Committee assumed that in most cases the issue would be whether the victim did freely agree to the sexual intercourse or sexual contact. If there was no agreement, it makes no difference whether or not the victim was "competent to give informed consent." The victim's being "competent . . ." would be in issue primarily in cases where consent was indicated and where the state contends that the victim was not competent to consent. These cases were thought to be rare enough to justify removing the "competent to give informed consent" material from the standard definition and treating it separately here.

2. The definition of "consent," found in Wis. Stat. § 940.225(4), applies to prosecutions under § 940.225. The definition of "without consent," found in § 939.22(48), is applicable to other Criminal Code offenses but does not apply to prosecutions under § 940.225. Section 940.225(4) reads as follows:

> "Consent," as used in this section, means words or overt actions by a person who is competent to give informed consent indicating a freely given agreement to have sexual intercourse or sexual contact. Consent is not an issue in alleged violations of subs. (2)(c), (d) and (g). The following persons are presumed incapable of consent but the presumption may be rebutted by competent evidence, subject to the provisions of § 972.11(2):
>
> (b) A person suffering from a mental illness or defect which impairs capacity to appraise personal conduct.
> (c) A person who is unconscious or for any other reason is physically unable to communicate unwillingness to an act.

The definition of "without consent" used in the instruction is designed for the usual case where no special circumstances recognized by the statute as affecting consent are present. If the evidence raises an issue about the victim's being unconscious, or being mentally ill, see Wis JI-Criminal 1200D and 1200E, which provide alternatives for these special circumstances.

The instruction on "without consent" rephrases the statutory definition in the interest of clarifying it for the jury. First, it states the element in the active voice by requiring that the victim did not consent. Second, the Committee concluded that it was more clear to refer to consent as a freely given agreement which may be shown by words or actions rather than to reiterate the statute which refers to consent as "words or overt actions indicating a freely given agreement." No change in meaning is intended. It is more direct to speak of consent as an agreement, evidence of which may be provided by words or actions of the victim, along with the other facts concerning the incident.

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If the jury finds that the victim did not in fact consent, it apparently is no defense that the defendant believed there was consent, even if the defendant's belief is reasonable. This is the case because Wis. Stat. § 940.225 uses none of the "intent words" which indicate that the defendant's knowledge of no consent is an element of the crime, see Wis. Stat. § 939.23.

3. See State v. Lederer, 99 Wis.2d 430, 299 N.W.2d 457 (Ct. App. 1980); State v. Clark, 89 Wis.2d 804, 275 N.W.2d 715 (1979).

4. Section 940.225(4) does not define "competent to give informed consent." There is no indication whether the classes of persons described in § 940.225(4)(b) and (c) are those who are not "competent to give informed consent," or whether a different category of individuals is contemplated. The Committee took the view that a broader category was intended and defined "competent to give informed consent" by reference to the general principles that apply to "informed consent" in other contexts— the ability to understand the act and its consequences.

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1200D "WITHOUT CONSENT" — COMPLAINANT SUFFERING FROM MENTAL ILLNESS — § 940.225(4)(b)

CAUTION: THIS INSTRUCTION APPLIES ONLY TO SEXUAL ASSAULT OFFENSES UNDER SECTION 940.225.

ADD THE FOLLOWING[1] TO THE STANDARD DEFINITION OF "WITHOUT CONSENT" IF THERE IS EVIDENCE THAT THE VICTIM WAS SUFFERING FROM MENTAL ILLNESS OR DEFECT AT THE TIME OF THE ALLEGED OFFENSE.

Effect of Mental Illness or Defect on Consent

There is evidence in this case that (name of victim) was suffering from a mental (illness) (defect) at the time of the alleged offense.

If you find that (name of victim) was suffering from a mental (illness) (defect) which impaired capacity to appraise personal conduct at the time of the alleged act of sexual (intercourse) (contact), you may find from that fact alone that (name of victim) did not consent, but you are not required to do so. You should not find that (name of victim) did not consent unless you are so satisfied beyond a reasonable doubt from all the evidence.[2]

COMMENT

This instruction was originally published as Wis JI-Criminal 1200C in 1983 and revised in 1990. It was revised and renumbered as JI 1200D in 1996. This revision adopted a new format and was approved by the Committee in May 2001.

The substance of this instruction was originally included in the body of each standard instruction to which it was relevant. It has been placed in a separate instruction in the interest of simplifying the instructions for the various sexual assault offenses.

1. This instruction is designed to implement § 940.225(4) and (4)(b) which provide that a person "suffering from a mental illness or defect which impairs capacity to appraise personal conduct" is "presumed" to be incapable of consent. (Sexual contact or intercourse with a mentally ill person is also prohibited by

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§ 940.225(2)(c) as a second degree sexual assault; consent is not an issue for that offense. See Wis JI-Criminal 1211.)

The Committee decided not to define "mental illness or defect" in the uniform instruction. Existing statutory definitions did not seem suitable because they are written in the context of determining when treatment is required or when involuntary commitment of the mentally ill person is appropriate. (See, for example, Wis. Stat. § 51.01(13)(a) and (b), and Wis. Stat. § 51.75(2)(c) and (d).) For the purposes of the Sexual Assault Law, the Committee concluded that the term "mental illness or defect" has a meaning within the common understanding of the jury. Additional guidance as to the type of illness or defect required is offered by the qualifying phrase in the statute: ". . . which impairs capacity to appraise personal conduct."

2. In Wisconsin, presumptions in criminal cases are "permissive," that is, the jury may, but is not required to, find the presumed fact (no consent) from the basic fact (mental illness). Moreover, the judge may not direct the jury to find a presumed fact against the accused. Where the presumed fact is an element of the offense, it must be proved beyond a reasonable doubt. (See Wis. Stat. § 903.03 and Judicial Council Committee's note reported at 59 Wis.2d R57-66.) The Committee believes the proper method for instructing on a presumption is illustrated in the instruction: The jury is told that if they find the basic fact (mental illness), they may, from that fact alone, find the presumed fact (no consent), but they are not required to do so and if they do so find, they must be satisfied beyond a reasonable doubt from all the evidence. See Wis JI-Criminal 225 for a discussion of instructing on presumptions.

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1200E "WITHOUT CONSENT" — COMPLAINANT UNCONSCIOUS — § 940.225(4)(c)

CAUTION: THIS INSTRUCTION APPLIES ONLY TO SEXUAL ASSAULT OFFENSES UNDER SECTION 940.225.

ADD THE FOLLOWING[1] TO THE STANDARD DEFINITION OF "WITHOUT CONSENT" IF THERE IS EVIDENCE THAT THE VICTIM WAS UNCONSCIOUS OR OTHERWISE UNABLE TO COMMUNICATE UNWILLINGNESS TO AN ACT AT THE TIME OF THE ALLEGED OFFENSE.

Effect of Unconsciousness on Consent

There is evidence in this case that (name of victim) was (unconscious) (unable to communicate unwillingness to an act) at the time of the alleged offense.

If you find that (name of victim) was (unconscious) (unable to communicate unwillingness to an act) at the time of the alleged act of sexual (intercourse) (contact), you may find from that fact alone that (name of victim) did not consent, but you are not required to do so. You should not find that (name of victim) did not consent unless you are so satisfied beyond a reasonable doubt from all the evidence.[2]

COMMENT

This instruction was originally published as Wis JI-Criminal 1200D in 1983 and revised in 1990. It was revised and renumbered as JI 1200E in 1996. This revision adopted a new format and was approved by the Committee in May 2001.

The substance of this instruction was originally included in the body of each standard instruction to which it was relevant. It has been placed in a separate instruction in the interest of simplifying the instructions for the various sexual assault offenses.

1. This instruction is designed to implement § 940.225(4) and (4)(c) which provide that a person who is "unconscious or otherwise unable to communicate unwillingness to an act" is "presumed" incapable of consent. Sexual contact or intercourse with an unconscious person is also prohibited by § 940.225(2)(d) as

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a second degree sexual assault; consent is not in issue for that offense. See Wis JI-Criminal 1213.

In a case which requires it, this material should be added to the standard definition of "without consent" found in each instruction on sexual assault offenses. It was the Committee's judgment that this instruction will seldom be used. If the victim was unconscious or unable to communicate at the time of the offense, there could clearly be no "words or overt actions" indicating consent as required by § 940.225(4).

2. In Wisconsin, presumptions in criminal cases are "permissive," that is, the jury may, but is not required to, find the presumed fact (no consent) from the basic fact (e.g., being unconscious). Moreover, the judge may not direct the jury to find a presumed fact against the accused. Where the presumed fact is an element of the offense, it must be proved beyond a reasonable doubt. (See Wis. Stat. § 903.03 and Judicial Council Committee's note reported at 59 Wis.2d R57-66.) The Committee believes the proper method for instructing on a presumption is illustrated in the instruction: The jury is told that if they find the basic fact (e.g., being unconscious), they may, from that fact alone, find the presumed fact (no consent), but they are not required to do so and if they do so find, they must be satisfied beyond a reasonable doubt from all the evidence. See Wis JI-Criminal 225 for a discussion of instructing on presumptions and "prima facie cases."

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1200F SEXUAL ASSAULT: SPOUSE AS VICTIM — § 940.225(6)

CAUTION: THIS INSTRUCTION APPLIES ONLY TO SEXUAL ASSAULT OFFENSES UNDER SECTION 940.225.

Effect of Marriage on Consent

At the time of the alleged act of sexual (contact) (intercourse), (name of victim) was married to the defendant.

The fact that (name of victim) was married to the defendant does not mean that (name of victim) consented to sexual (contact) (intercourse). [The fact of marriage may be considered along with all the evidence in the case in determining whether there was consent.][1]

COMMENT

This instruction was originally published as Wis JI-Criminal 1200E in 1983 and revised in 1990. It was revised and renumbered as Wis JI-Criminal 1200F in 1996. This revision adopted a new format and was approved by the Committee in May 2001.

This instruction is to implement § 940.225(6), as repealed and recreated by Chapter 310, Laws of 1981. The revised statute applies to offenses committed on or after May 1, 1982, and reads as follows:

> (6) MARRIAGE NOT A BAR TO PROSECUTION. A defendant shall not be presumed to be incapable of violating this section because of marriage to the complainant.

The Prefatory Note to Chapter 310 provided: "This proposal repeals the spousal exception to the sexual assault law and creates a provision intended to negate any presumption that a person is incapable of committing sexual assault because of marriage to the victim."

1. The sentence in brackets should be included only for offenses which do not involve the use of weapons or force or the causing of great bodily harm. However, for charges of third and fourth degree sexual assault, for example, the sentence in brackets is appropriate because the fact of marriage is relevant to determining whether there was consent in those less aggravated instances.

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1200G CAUTIONARY INSTRUCTION: EVIDENCE OF VICTIM'S PRIOR SEXUAL CONDUCT — § 972.11(2)(b)

CHOOSE THE APPROPRIATE BRACKETED ALTERNATIVE[S].

EVIDENCE ADMITTED UNDER § 972.11(2)(b)1[1]

[Evidence of prior sexual conduct between (name of victim) and the defendant has been introduced. If you find that this conduct did occur, you should consider it only (describe acceptable purpose).[2] Do not consider it for any other purpose.]

EVIDENCE ADMITTED UNDER § 972.11(2)(b)2[3]

[Evidence of prior sexual conduct on the part of (name of victim) has been introduced. If you find that this conduct did occur, you should consider it only in determining the source or origin of (semen) (pregnancy) (disease).[4] Do not consider it for any other purpose.]

ADD THE FOLLOWING IF "WITHOUT CONSENT" IS AN ELEMENT OF THE CRIME AND THE EVIDENCE RELATES TO CONDUCT WITH A PERSON OTHER THAN THE DEFENDANT.[5]

[In particular, do not consider this evidence in determining whether (name of victim) consented to the alleged sexual (contact) (intercourse).]

EVIDENCE ADMITTED UNDER § 972.11(2)(b)3[6]

[Evidence of prior allegations of sexual assault made by (name of victim) has been introduced. If you find that the allegations were made and were untruthful, consider them only (describe acceptable purpose).[7] Do not consider this evidence for any other purpose.]

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EVIDENCE ADMITTED UNDER THE GENERAL, CONSTITUTIONALLY-REQUIRED EXCEPTION[8]

[Evidence of prior sexual conduct on the part of (name of victim) has been introduced in this case. If you find that this conduct did occur, you should consider it only (describe acceptable purpose).[9] Do not consider this evidence for any other purpose.]

COMMENT

This instruction was originally published as Wis JI-Criminal 1200F in 1983 and revised in 1984 and 1990. It was revised and renumbered as Wis JI-Criminal 1200G in 1996 and revised in 2002, 2011, and 2012. This revision was approved by the Committee in April 2012; it noted additions to the applicability of § 972.1(2) made by 2011 Wisconsin Act 271.

This instruction is intended to advise the jury on the proper use of evidence of prior sexual conduct when that evidence is admitted under § 972.11(2)(b). The statute applies only to prosecutions under twelve specified statutes:

- § 940.225, Sexual Assault;
- § 948.02, Sexual Assault of A Child;
- § 948.025, Engaging In Repeated Sexual Assaults of the Same Child;
- § 948.05, Sexual Exploitation of A Child;
- § 948.051, Trafficking of A Child;
- § 948.06, Incest With A Child;
- § 948.07, Child Enticement;
- § 948.08, Soliciting a Child for Prostitution;
- § 948.085, Sexual Assault of A Child Placed in Substitute Care;
- § 948.09, Sexual Intercourse with a Child Age 16 or Older;
- § 948.095, Sexual Assault of a Student by a School Instructional Staff Person; and,
- § 940.302(2), Human Trafficking, ["if the court finds that the crime was sexually motivated, as defined in s. 980.01(5)."]

Sections 948.07, 948.08, and 948.09 were added by 2011 Wisconsin Act 271 [effective date: April 24, 2012].

The 2001 revision modified this instruction by providing an alternative paragraph for each of the three exceptions recognized by § 972.11(2)(b)1.-3. and for the general, constitutionally-required exception recognized by case law.

Analysis of admissibility under § 972.11(2) involves three steps determining whether: the evidence falls within an exception set forth in § 972.11(2)(b)1.-3.; the evidence is material to a fact at issue; and, the evidence is of sufficient probative value to outweigh its inflammatory and prejudicial nature. State v. DeSantis, 155 Wis.2d 774, 456 N.W.2d 600 (1990).

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When evidence is admitted for a limited purpose, an instruction limiting the jury's consideration to the proper purpose must be given upon request. § 901.06.

Cases have established the following about § 972.11's prior sexual conduct evidence rule:

— "prior" means prior to trial; it is not limited to prior to the incident on which the criminal charge is based. State v. Gulrud, 140 Wis.2d 721, 421 N.W.2d 739 (Ct. App. 1987).

— "sexual conduct" evidence includes evidence of the lack of sexual activity or experience. State v. Gavigan, supra; State v. Mitchell, supra; State v. Penigar, 139 Wis.2d 569, 408 N.W.2d 862 (1987); and, State v. Childs, 146 Wis.2d 116, 430 N.W.2d 353 (Ct. App. 1988).

— "sexual conduct" evidence includes written notes relating to sexual activity. State v. Vonesh, 135 Wis.2d 477, 401 N.W.2d 170 (Ct. App. 1987).

Case law has established that prior sexual conduct evidence may be admissible even if it does not fit one of the statutory exceptions. The first case articulating this principle was State v. Gavigan, 111 Wis.2d 150, 330 N.W.2d 571 (1983), which involved evidence of the victim's lack of prior sexual experience introduced by the state. The court held that the evidence was admissible if offered "to prove a fact independent of the complainant's prior sexual conduct which is relevant to an issue in the case." The decision also held that a cautionary instruction should be given to "state the limited purpose of the evidence and inform the jury that the evidence may not be considered as indicating the complainant's prior sexual conduct."

The legislature responded to Gavigan by enacting 1983 Wisconsin Act 449. Effective May 18, 1984, section 972.11(2)(c) was created to read:

> (c) Notwithstanding § 901.06, the limitation on the admission of evidence of or reference to the prior sexual conduct of the complaining witness in par. (b) applies regardless of the purpose of the admission or reference unless the admission is expressly permitted under par. (b) 1., 2., or 3.

While the creation of subsection (2)(c) could be viewed as an attempt to limit the Gavigan decision, the Wisconsin Supreme Court has reviewed it and has found that it was not an unconstitutional invasion of the powers of the judicial branch. State v. Mitchell, 144 Wis.2d 596, 424 N.W.2d 698 (1988).

In State v. Herndon, 145 Wis.2d 91, 426 N.W.2d 347 (Ct. App. 1988), the court held that § 972.11(2) must be subject to exceptions based on the defendant's 6th amendment right to present evidence and to confront adverse witnesses:

> . . . where the evidence to be admitted is probative of the complainant's bias or prejudice, shows that she has a motive to fabricate, or shows a continuing pattern of conduct, the trial court must balance the probativeness of the evidence against its prejudicial nature. A refusal to allow this evidence in all cases based solely upon an evidentiary rule is a violation of the defendant's sixth amendment rights to confront adverse witnesses and present witnesses on his own behalf.

The court identified a six-part test to be used in conducting the required balancing. The Wisconsin Supreme Court adopted a similar rationale and balancing test in State v. Pulizzano, 155 Wis.2d 633, 456 N.W.2d 325 (1990). See note 8, below.

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1. This paragraph is drafted for use where evidence is admitted under sub. (2)(b)1. of § 972.11, which provides an exception to the rape shield rule for "evidence of the complaining witness's past conduct with the defendant."

2. The issue to which the evidence is relevant should be described in this blank.

Determining whether past conduct between the complaining witness and the defendant is admissible for an acceptable purpose is a highly fact-dependent inquiry. Wisconsin case law suggests that past conduct can be relevant to the issue whether the act involved in the case was "without consent," but does not provide clear guidance.

State v. Neumann, 179 Wis.2d 687, 508 N.W.2d 54 (Ct. App. 1993), involved changes of forcible sexual assault — without consent and by use or threat of force — by Neumann against his girlfriend. The trial court allowed evidence of prior consensual sexual activity between them, but then instructed the jury that it could not be considered in determining whether there was consent. The court of appeals found this was error, but harmless because the evidence of prior consensual non-violent sexual conduct has virtually no probative value regarding consent to sexual intercourse by the use or threat of force. In a footnote, the court noted that while Wisconsin had no case directly on point, other jurisdictions have generally concluded that prior consensual activity is relevant to the consent issue. 179 Wis.2d 687, 701-02, footnote 5.

In State v. Jackson, 216 Wis.2d 646, 575 N.W.2d 475 (1998), the court held that while evidence of prior conduct between the complaining witness and the defendant fit the exception under sub. (2)(b)1., the evidence was still not admissible. "[M]erely offering proof of the general type described in a particular exception is not enough to defeat the rape shield statute." 216 Wis.2d 646, 658. The defendant must establish that the evidence is "of sufficient probative value to outweigh its inflammatory and prejudicial nature." See § 971.31(11). In this case, the defendant failed to do that. 216 Wis.2d 646, 663.

3. This paragraph is drafted for use where evidence is admitted under sub. (2)(b)2. of § 972.11, which provides an exception to the rape shield law for "evidence of specific instances of sexual conduct showing the source or origin of semen, pregnancy or disease, for use in determining the degree of sexual assault or the extent of injury suffered."

4. This tracks the language of sub. (b)2. of § 972.11, which goes on to specify the uses to which the evidence may be put: "for use in determining the degree of sexual assault or the extent of injury suffered." The Committee concluded that the latter need not be communicated to the jury; it merely describes the reasons the evidence was admitted. See State v. Dodson, 219 Wis.2d 65, 580 N.W.2d 181 (1998), finding reversible error in the refusal to admit evidence to show alternative source of physical injury.

Evidence that the hymen of an eight-year-old victim was dilated is not admissible under the "source of . . . disease" exception. In the Interest of Michael R. B., 170 Wis.2d 713, 727-730, 499 N.W.2d 641 (1993). However, it was error to exclude the testimnony of a doctor called by the defense who would have testified about the normal dilation of an eight-year-old's hymen. 170 Wis.2d 713, 733.

5. This optional paragraph is intended for use when the prior sexual conduct evidence relates to the victim's activity with someone other than the defendant. It is meant to emphasize one of the protections rape shield laws are designed to provide: that it is not to be assumed that a person consented to a sexual act merely because that person has consented to sexual activity in the past. Evidence of prior sexual conduct with the defendant is addressed by sub. (2)(b)1. in the preceding bracketed paragraph.

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6. This paragraph is drafted for use where evidence is admitted under sub. (2)(b)3. of § 972.11, which provides an exception to the rape shield law for "evidence of prior untruthful allegations of sexual assault made by the complaining witness." It is intended to emphasize that the jury must first determine that other allegations of sexual assault were made and that those allegations were false. This is consistent with the 3-step procedure set forth in State v. DeSantis, 155 Wis.2d 774, 456 N.W.2d 600 (1990): the evidence falls within the exception set forth in § 972.11(2)(b)3.; the evidence is material to a fact at issue; and, the evidence is of sufficient probative value to outweigh its inflammatory and prejudicial nature. As to the first step, the evidence must be "sufficient to support a reasonable person's finding that the complainant made prior untruthful allegations." DeSantis, supra, 155 Wis.2d 774, 788.

In State v. Ringer, 2010 WI 69, 326 Wis.2d 351, 785 N.W.2d 448, the court noted that DeSantis used two different statements in describing the test: whether a jury could reasonably find that there was a prior untruthful allegation and whether it could reasonably infer that there was a prior untruthful allegation. To resolve this perceived inconsistency, the court adopted "could reasonably find" as the proper statement. The court also held that the fact that there was no prosecution in connection with the prior allegations, "in and of itself, does not support a finding that the allegations were untruthful." Ringer, ¶40.

7. The issue to which the evidence is relevant should be described in this blank. Usually, that issue will be credibility.

8. This paragraph is drafted for use where evidence is admitted under the general, constitutionally-based, exception based on the defendant's due process right to present relevant evidence. The applicability of the exception is to be determined by using a five-part test, adopted in State v. Pulizzano, 155 Wis.2d 633, 456 N.W.2d 325 (1990):

> (1) that the prior acts clearly occurred; (2) that the acts closely resembled those of the present case; (3) that the prior act is clearly relevant to a material issue; (4) that the evidence is necessary to the defendant's case; and (5) that the probative value of the evidence outweighs its prejudicial effect.

If the defendant's offer of proof meets the five-part test, "the court must determine whether the defendant's rights to present the proffered evidence are nonetheless outweighed by the State's compelling interest to exclude the evidence." State v. Dodson, 219 Wis.2d 65, ¶11, 580 N.W.2d 181 (1998). For a case finding that the prior acts did not closely resemble those of the instant case, see State v. Dunlap, 2002 WI 19, 250 Wis.2d 466, 640 N.W.2d 112.

Pulizzano held that the evidence offered in that case was relevant to show an alternative source of sexual knowledge on the part of the child victim. The court also held that "[l]imiting instructions should be given to restrict the trier of fact's use of the evidence to that purpose." 155 Wis.2d 633, 656. Also see the following, each finding that excluding evidence offered for this purpose was reversible error: State v. Dodson, 219 Wis.2d 65, 580 N.W.2d 181 (1998); State v. Moats, 156 Wis.2d 74, 457 N.W.2d 299 (1990); and, State v. Jagielski, 161 Wis.2d 67, 467 N.W.2d 196 (Ct. App. 1991). In State v. Hammer, 2000 WI 92, 236 Wis.2d 686, 613 N.W.2d 629, the court held evidence of sexual acts between a child victim and others on the day before the crime was not admissible to show bias and a motive to fabricate.

9. The issue to which the evidence is relevant should be described in this blank. For example: ". . . you should consider it only as it relates to an alternative source of sexual knowledge." See, State v. Pulizzano, note 8, supra.

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1201 FIRST DEGREE SEXUAL ASSAULT: SEXUAL CONTACT OR INTERCOURSE WITHOUT CONSENT CAUSING GREAT BODILY HARM — § 940.225(1)(a)

Statutory Definition of the Crime

First degree sexual assault, as defined in § 940.225(1)(a) of the Criminal Code of Wisconsin, is committed by one who has sexual [contact] [intercourse] with another person without consent and causes great bodily harm to that person.

State's Burden of Proof

Before you may find the defendant guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following three elements were present.

Elements of the Crime That the State Must Prove

1. The defendant had sexual [contact] [intercourse] with (name of victim).
2. (Name of victim) did not consent to the sexual [contact] [intercourse].
3. The defendant caused great bodily harm to (name of victim).[1]

Meaning of [Sexual Contact] [Sexual Intercourse]

REFER TO WIS JI-CRIMINAL 1200A FOR DEFINITION OF "SEXUAL CONTACT" AND WIS JI-CRIMINAL 1200B FOR DEFINITION OF "SEXUAL INTERCOURSE" AND INSERT THE APPROPRIATE DEFINITION HERE.

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Meaning of Did Not Consent[2]

"Did not consent" means that (name of victim) did not freely agree to have sexual [contact] [intercourse] with the defendant. In deciding whether (name of victim) did not consent, you should consider what (name of victim) said and did, along with all the other facts and circumstances. This element does not require that (name of victim) offered physical resistance.[3]

Meaning of Great Bodily Harm

"Great bodily harm" means serious bodily injury.[4] [Injury which creates a substantial risk of death, or which causes serious permanent disfigurement, or which causes a permanent or protracted loss or impairment of the function of any bodily member or organ, or other serious bodily injury is great bodily harm.]

Jury's Decision

If you are satisfied beyond a reasonable doubt that all three elements of first degree sexual assault have been proved, you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.

COMMENT

This instruction was originally published in 1980 as Wis JI-Criminal 1200 [for sexual intercourse offenses] and Wis JI-Criminal 1201 [for sexual contact offenses]. Those instructions were revised in 1983, 1990, and 1992. A revision combining the instructions as Wis JI-Criminal 1201 was published in 1996 and revised in 1998 and 2000. The 2000 revision involved adoption of a new format and nonsubstantive changes to the text. This revision made a minor change in the definition of consent and was approved by the Committee in December 2001.

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This instruction is for two of the types of first degree sexual assault defined by § 940.225(1)(a): sexual contact or sexual intercourse without consent causing great bodily harm. Wis JI-Criminal 1201A is drafted for the other violation of this statute: sexual intercourse without consent causing pregnancy.

The revised instruction provides for inserting definitions of "sexual contact" and "sexual intercourse" provided in Wis JI-Criminal 1200A and 1200B. That definitional material was formerly included in the text of each offense instruction. When a new alternative was added to the statutory definition of sexual contact by 1995 Wisconsin Act 69, the Committee decided to modify its original approach by providing separate instructions for the definitions. The Committee believes that this will be more convenient to the users of the instructions, making it easier to prepare an instruction that is tailored to the facts of the case.

1. In the Committee's judgment, if the act of intercourse or contact was without consent, the act itself need not cause the great bodily harm. It is sufficient if great bodily harm was caused by the defendant during the course of conduct that immediately preceded or followed the act of nonconsensual intercourse or contact. This analysis was adopted as an accurate statement of the law in State v. Schambow, 176 Wis.2d 286, 298-99, 500 N.W.2d 362 (Ct. App. 1993). [At that time, the statement was found at footnote 7 to Wis JI-Criminal 1200, © 1992.]

If there was consent to the act of intercourse and it is followed by acts causing great bodily harm, the Committee concluded that there is no violation of § 940.225(1)(a). However, the acts may constitute battery, aggravated battery, or related offenses.

2. The definition of "consent," found in Wis. Stat. § 940.225(4), applies to prosecutions under § 940.225. The definition of "without consent," found in § 939.22(48), is applicable to other Criminal Code offenses but does not apply to prosecutions under § 940.225. Section 940.225(4) reads as follows:

> "Consent," as used in this section, means words or overt actions by a person who is competent to give informed consent indicating a freely given agreement to have sexual intercourse or sexual contact. Consent is not an issue in alleged violations of subs. (2)(c), (d) and (g). The following persons are presumed incapable of consent but the presumption may be rebutted by competent evidence, subject to the provisions of § 972.11(2):
>
> (b) A person suffering from a mental illness or defect which impairs capacity to appraise personal conduct.
> (c) A person who is unconscious or for any other reason is physically unable to communicate unwillingness to an act.

The definition of "without consent" used in the instruction is designed for the usual case where no special circumstances recognized by the statute as affecting consent are present. If the evidence raises an issue about the victim's being "competent to give informed consent," being unconscious, or being mentally ill, see Wis JI-Criminal 1200C, 1200D, and 1200E, which provide alternatives for these special circumstances.

The instruction on "without consent" rephrases the statutory definition in the interest of clarifying it for the jury. First, it states the element in the active voice by requiring that the victim did not consent. Second, the Committee concluded that it was more clear to refer to consent as a freely given agreement which may

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be shown by words or actions rather than to reiterate the statute which refers to consent as "words or overt actions indicating a freely given agreement." No change in meaning is intended. It is more direct to speak of consent as an agreement, evidence of which may be provided by words or actions of the victim, along with the other facts concerning the incident.

If the jury finds that the victim did not in fact consent, it apparently is no defense that the defendant believed there was consent, even if the defendant's belief is reasonable. This is the case because Wis. Stat. § 940.225 uses none of the "intent words" which indicate that the defendant's knowledge of no consent is an element of the crime, see Wis. Stat. § 939.23.

3. See State v. Lederer, 99 Wis.2d 430, 299 N.W.2d 457 (Ct. App. 1980); State v. Clark, 89 Wis.2d 804, 275 N.W.2d 715 (1979).

4. The Committee has concluded that defining great bodily harm as "serious bodily injury" is sufficient in most cases. The material in brackets is the remainder of the definition found in § 939.22(14) and should be used as needed. The definition was changed by 1987 Wisconsin Act 399 to substitute "substantial risk" for "high probability" in the phrase "substantial risk of death." See Wis JI-Criminal 914.

Whether or not an injury suffered amounts to "great bodily harm" is an issue of fact for the jury to resolve. See Flores v. State, 76 Wis.2d 50, 250 N.W.2d 227 720 (1976). Although it was not a sexual assault case, Flores may be helpful in deciding when an instruction on the lesser included offense under § 940.225(2)(b), **SEXUAL INTERCOURSE CAUSING INJURY**, is appropriate. See Wis JI-Criminal 1210.

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1201A FIRST DEGREE SEXUAL ASSAULT: SEXUAL INTERCOURSE WITHOUT CONSENT CAUSING PREGNANCY — § 940.225(1)(a)

Statutory Definition of the Crime

First degree sexual assault, as defined in § 940.225(1)(a) of the Criminal Code of Wisconsin, is committed by one who has sexual intercourse with another person without consent and causes that person to become pregnant.

State's Burden of Proof

Before you may find the defendant guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following three elements were present.

Elements of the Crime That the State Must Prove

1. The defendant had sexual intercourse[1] with (name of victim).
2. (Name of victim) did not consent to the sexual intercourse.
3. The defendant caused (name of victim) to become pregnant.[2]

Meaning of "Did Not Consent"[3]

"Did not consent" means that (name of victim) did not freely agree to have sexual [contact] [intercourse] with the defendant. In deciding whether (name of victim) did not consent, you should consider what (name of victim) said and did, along with all the other facts and circumstances. This element does not require that (name of victim) offered physical resistance.[4]

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Jury's Decision

If you are satisfied beyond a reasonable doubt that all three elements of first degree sexual assault have been proved, you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.

COMMENT

This instruction was originally published in 1980 as Wis JI-Criminal 1200A and revised in 1983 and 1990 and was renumbered Wis JI-Criminal 1201A in 1996. This revision was approved by the Committee in December 2001 and involved adoption of a new format and nonsubstantive changes to the text.

1. "Sexual intercourse" is not defined in this instruction because "causing pregnancy" is an element of the crime. If it is established that pregnancy was caused, both penetration and emission must have occurred, which makes much of the definition of "sexual intercourse" in § 940.225(5)(c) inapplicable. If definition is believed to be necessary, see Wis JI-Criminal 1200B.

2. "Pregnancy" is not defined in the instruction. In the rare case where this offense is charged and causation is in issue, Wis JI-Civil 5001, Paternity, may be helpful.

3. The definition of "consent," found in Wis. Stat. § 940.225(4), applies to prosecutions under § 940.225. The definition of "without consent," found in § 939.22(48), is applicable to other Criminal Code offenses but does not apply to prosecutions under § 940.225. Section 940.225(4) reads as follows:

> "Consent," as used in this section, means words or overt actions by a person who is competent to give informed consent indicating a freely given agreement to have sexual intercourse or sexual contact. Consent is not an issue in alleged violations of subs. (2)(c), (d) and (g). The following persons are presumed incapable of consent but the presumption may be rebutted by competent evidence, subject to the provisions of § 972.11(2):
>
> (b) A person suffering from a mental illness or defect which impairs capacity to appraise personal conduct.
> (c) A person who is unconscious or for any other reason is physically unable to communicate unwillingness to an act.

The definition of "without consent" used in the instruction is designed for the usual case where no special circumstances recognized by the statute as affecting consent are present. If the evidence raises an issue about the victim's being "competent to give informed consent," being unconscious, or being mentally ill, see Wis JI-Criminal 1200C, 1200D, and 1200E, which provide alternatives for these special circumstances.

The instruction on "without consent" rephrases the statutory definition in the interest of clarifying it for

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the jury. First, it states the element in the active voice by requiring that the victim did not consent. Second, the Committee concluded that it was more clear to refer to consent as a freely given agreement which may be shown by words or actions rather than to reiterate the statute which refers to consent as "words or overt actions indicating a freely given agreement." No change in meaning is intended. It is more direct to speak of consent as an agreement, evidence of which may be provided by words or actions of the victim, along with the other facts concerning the incident.

If the jury finds that the victim did not in fact consent, it apparently is no defense that the defendant believed there was consent, even if the defendant's belief is reasonable. This is the case because Wis. Stat. § 940.225 uses none of the "intent words" which indicate that the defendant's knowledge of no consent is an element of the crime, see Wis. Stat. § 939.23.

4. See State v. Lederer, 99 Wis.2d 430, 299 N.W.2d 457 (Ct. App. 1980); State v. Clark, 89 Wis.2d 804, 275 N.W.2d 715 (1979).

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1203 FIRST DEGREE SEXUAL ASSAULT: SEXUAL CONTACT OR INTERCOURSE WITHOUT CONSENT BY USE OR THREAT OF USE OF A DANGEROUS WEAPON — § 940.225(1)(b)

Statutory Definition of the Crime

First degree sexual assault, as defined in § 940.225(1)(b) of the Criminal Code of Wisconsin, is committed by one who has sexual [contact] [intercourse] with another person without consent and by use or threat of use of [a dangerous weapon] [an article used or fashioned in a manner to lead the other person to reasonably believe it was a dangerous weapon].

State's Burden of Proof

Before you may find the defendant guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following three elements were present.

Elements of the Crime That the State Must Prove

1. The defendant had sexual [contact] [intercourse] with (name of victim).
2. (Name of victim) did not consent to the sexual [contact] [intercourse].
3. The defendant had sexual [contact] [intercourse] with (name of victim) by use or threat of use of [a dangerous weapon] [an article used or fashioned in a manner to lead the other person to reasonably believe[1] it was a dangerous weapon].

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This requires that the defendant actually used or threatened to use[2] [the dangerous weapon] [an article which (name of victim) reasonably believed capable of producing death or great bodily harm)[3] to compel (name of victim) to submit[4] to sexual [contact] [intercourse].

[Meaning of "Dangerous Weapon"]

[A dangerous weapon is (any firearm, whether loaded or not) (any device designed as a weapon and capable of producing death or great bodily harm) (any device or instrumentality which in the manner it is used or intended to be used is calculated or likely to produce death or great bodily harm).[5]]

Meaning of ["Sexual Contact"] ["Sexual Intercourse"]

REFER TO WIS JI-CRIMINAL 1200A FOR DEFINITION OF "SEXUAL CONTACT" AND WIS JI-CRIMINAL 1200B FOR DEFINITION OF "SEXUAL INTERCOURSE" AND INSERT THE APPROPRIATE DEFINITION HERE.

Meaning of "Did Not Consent"[6]

"Did not consent" means that (name of victim) did not freely agree to have sexual [contact] [intercourse] with the defendant. In deciding whether (name of victim) did not consent, you should consider what (name of victim) said and did, along with all the other facts and circumstances. This element does not require that (name of victim) offered physical resistance.[7]

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Jury's Decision

If you are satisfied beyond a reasonable doubt that all three elements of first degree sexual assault have been proved, you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.

COMMENT

This instruction was originally published in 1980 as Wis JI-Criminal 1202 [for sexual intercourse offenses] and Wis JI-Criminal 1203 [for sexual contact offenses]. Those instructions were revised in 1983 and 1990. A revision combining the instructions as Wis JI-Criminal 1203 was published in 1996. This revision was approved by the Committee in December 2001 and involved adoption of a new format and nonsubstantive changes to the text.

The revised instruction provides for inserting definitions of "sexual contact" and "sexual intercourse" provided in Wis JI-Criminal 1200A and 1200B. That definitional material was formerly included in the text of each offense instruction. When a new alternative was added to the statutory definition of sexual contact by 1995 Wisconsin Act 69, the Committee decided to modify its original approach by providing separate instructions for the definitions. The Committee believes that this will be more convenient to the users of the instructions, making it easier to prepare an instruction that is tailored to the facts of the case.

1. "Reasonably believe" is defined by § 939.22(32) to mean "that the actor believes that a certain fact situation exists and such belief under the circumstances is reasonable even though erroneous."

2. The phrase, "by use or threat of force or violence," as used in subsection (2)(a) of § 940.225 was construed in State v. Baldwin, 101 Wis.2d 441, 304 N.W.2d 742 (1981). The court held that jury agreement is not required on "use" as opposed to "threat" or on "force" as opposed to "violence." Thus instructing the jury in the disjunctive is acceptable in this instance, although the Committee recommends selecting one of the alternatives whenever the evidence supports only one. See Wis JI-Criminal 1207, note 2, regarding the construction of the same phrase used in § 940.225(2)(a).

3. Section 940.225(1)(b) describes this alternative as "an article used or fashioned in a manner to lead the victim reasonably to believe it to be a dangerous weapon." There are three categories within the definition of dangerous weapon, see § 939.22(10) and note 3, supra. Rather than reiterate the three alternatives of the dangerous weapon definition in the instruction, the Committee determined it was clearer to use a modified statement of the third statutory alternative: "A device likely to produce death or great bodily harm." This alternative goes to the crux of the matter where the victim does not actually see the weapon — what did the victim believe — and is broad enough to cover the other alternatives of the dangerous weapon definition: firearm and a device designed as a weapon.

The "article used or fashioned . . ." alternative is also used in the Wisconsin armed robbery statute, § 943.32(2). The appellate decisions interpreting that provision are discussed in the footnotes to Wis

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JI-Criminal 1480 and 1480A.

4. Section 940.225(1)(b) states that the defendant must have had sexual intercourse or sexual contact "by use or threat of use of a dangerous weapon. . . ." The nature of the connection between the intercourse or contact and the use of the weapon is left unclear. The Committee feels the intent of the statute is to cover those situations where the defendant used a weapon (or article . . .) to compel the victim to submit to the contact or intercourse and has expressed the connection in those terms in the instructions.

5. The Committee suggests using the part of the statutory definition that applies to the facts of the case. The definition in the instruction does not include all the alternatives provided in § 939.22(10), which defines "dangerous weapon" as follows:

> "Dangerous weapon" means any firearm, whether loaded or unloaded; any device designed as a weapon and capable of producing death or great bodily harm; any electric weapon as defined in § 941.295(4); or any other device or instrumentality which, in the manner it is used or intended to be used, is calculated or likely to produce death or great bodily harm.

See Wis JI-Criminal 910 for suggested instructions for all the statutory alternatives and a discussion of some of the substantive issues relating to "dangerous weapons."

6. The definition of "consent," found in Wis. Stat. § 940.225(4), applies to prosecutions under § 940.225. The definition of "without consent," found in § 939.22(48), is applicable to other Criminal Code offenses but does not apply to prosecutions under § 940.225. Section 940.225(4) reads as follows:

> "Consent," as used in this section, means words or overt actions by a person who is competent to give informed consent indicating a freely given agreement to have sexual intercourse or sexual contact. Consent is not an issue in alleged violations of subs. (2)(c), (d) and (g). The following persons are presumed incapable of consent but the presumption may be rebutted by competent evidence, subject to the provisions of § 972.11(2):
>
> (b) A person suffering from a mental illness or defect which impairs capacity to appraise personal conduct.
> (c) A person who is unconscious or for any other reason is physically unable to communicate unwillingness to an act.

The definition of "without consent" used in the instruction is designed for the usual case where no special circumstances recognized by the statute as affecting consent are present. If the evidence raises an issue about the victim's being "competent to give informed consent," being unconscious, or being mentally ill, see Wis JI-Criminal 1200C, 1200D, and 1200E, which provide alternatives for these special circumstances.

The instruction on "without consent" rephrases the statutory definition in the interest of clarifying it for the jury. First, it states the element in the active voice by requiring that the victim did not consent. Second, the Committee concluded that it was more clear to refer to consent as a freely given agreement which may be shown by words or actions rather than to reiterate the statute which refers to consent as "words or overt actions indicating a freely given agreement." No change in meaning is intended. It is more direct to speak

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of consent as an agreement, evidence of which may be provided by words or actions of the victim, along with the other facts concerning the incident.

If the jury finds that the victim did not in fact consent, it apparently is no defense that the defendant believed there was consent, even if the defendant's belief is reasonable. This is the case because Wis. Stat. § 940.225 uses none of the "intent words" which indicate that the defendant's knowledge of no consent is an element of the crime, see Wis. Stat. § 939.23.

7. See State v. Lederer, 99 Wis.2d 430, 299 N.W.2d 457 (Ct. App. 1980); State v. Clark, 89 Wis.2d 804, 275 N.W.2d 715 (1979).

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1205 FIRST DEGREE SEXUAL ASSAULT: SEXUAL CONTACT OR INTERCOURSE WITHOUT CONSENT BY USE OR THREAT OF FORCE OR VIOLENCE WHILE AIDED AND ABETTED — § 940.225(1)(c)

Statutory Definition of the Crime

First degree sexual assault, as defined in § 940.225(1)(c) of the Criminal Code of Wisconsin, is committed by one who has sexual [contact] [intercourse] with another person without consent and by use or threat of force or violence, and is aided and abetted[1] by one or more other persons.

State's Burden of Proof

Before you may find the defendant guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following four elements were present.

Elements of the Crime That the State Must Prove

1. The defendant had sexual [contact] [intercourse] with (name of victim).
2. (Name of victim) did not consent to the sexual [contact] [intercourse].
3. The defendant had sexual [contact] [intercourse] with (name of victim) by use or threat of force or violence.[2]

   The use or threat of force or violence may occur before or as part of the sexual (contact) (intercourse).[3]

   SELECT THE ALTERNATIVES SUPPORTED BY THE EVIDENCE

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[This element is satisfied if the use or threat of force or violence compelled (name of victim) to submit.][4]

[Use or threat of force or violence on one date can carry over to an alleged sexual assault on a later date if the use or threat of force or violence continued to weigh on (name of victim) and caused (him) (her) to cooperate out of fear for (his) (her) safety.][5]

[The phrase "by use of force" includes forcible sexual contact or force used as the means of making sexual contact.][6]

4. The defendant was aided and abetted by one or more other persons.[7]

Meaning of ["Sexual Contact"] ["Sexual Intercourse"]

REFER TO WIS JI-CRIMINAL 1200A FOR DEFINITION OF "SEXUAL CONTACT" AND WIS JI-CRIMINAL 1200B FOR DEFINITION OF "SEXUAL INTERCOURSE" AND INSERT THE APPROPRIATE DEFINITION HERE.

Meaning of "Did Not Consent"[8]

"Did not consent" means that (name of victim) did not freely agree to have sexual [contact] [intercourse] with the defendant. In deciding whether (name of victim) did not consent, you should consider what (name of victim) said and did, along with all the other facts and circumstances. This element does not require that (name of victim) offered physical resistance.[9]

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Meaning of "Aiding and Abetting"

The defendant was aided and abetted if another person knew that the defendant was having or intended to have sexual [contact] [intercourse] without consent and either:

- provided assistance to the defendant; or,
- was willing to assist the defendant if needed and the defendant knew of the willingness to assist.

Assistance may be provided by words, acts, encouragement, or support.[10]

ADD THE FOLLOWING IF RAISED BY THE EVIDENCE:[11]

[However, a person does not aid and abet if (he) (she) is only a bystander or spectator and does nothing to assist or encourage the commission of a crime.]

Jury's Decision

If you are satisfied beyond a reasonable doubt that all four elements of first degree sexual assault have been proved, you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.

COMMENT

This instruction was originally published in 1980 as Wis JI-Criminal 1204 [for sexual intercourse offenses] and Wis JI-Criminal 1205 [for sexual contact offenses]. Those instructions were revised in 1983, 1988, and 1990. A revision combining the instructions as Wis JI-Criminal 1205 was published in 1996 and revised in 2002 and 2005. A nonsubstantive change was made in 2016. This revision was approved by the Committee in 2018; it involved an editorial correction to footnote 10.

The instruction provides for inserting definitions of "sexual contact" and "sexual intercourse" provided in Wis JI-Criminal 1200A and 1200B. That definitional material was formerly included in the text of each offense instruction. When a new alternative was added to the statutory definition of sexual contact by 1995 Wisconsin Act 69, the Committee decided to modify its original approach by providing separate instructions

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for the definitions. The Committee believes that this will be more convenient to the users of the instructions, making it easier to prepare an instruction that is tailored to the facts of the case.

This offense, like the offense defined in sub. (2)(a), has an element requiring the "use or threat of force." The case law interpreting that element has developed in cases under sub. (2)(a), but the Committee concluded that the interpretations apply to this offense as well. See footnotes 2-6.

1. Section 940.225(1)(c) uses the phrase, "aided or abetted," (emphasis added). Since traditional criminal statutes have referred to "aiding and abetting," the Committee has used that construction in this instruction. The Committee feels that this does not change the meaning of the statute or of the aiding and abetting concept. In State v. Thomas, 128 Wis.2d 93, 381 N.W.2d 567 (Ct. App. 1985), the court held that "aided or abetted" in § 940.225(1)(c) has the same meaning as the phrase "aids and abets" in § 939.05 and therefore is not unconstitutionally vague.

2. The phrase, "by use or threat of force or violence," as used in subsection (2)(a) of § 940.225 was construed in State v. Baldwin, 101 Wis.2d 441, 304 N.W.2d 742 (1981). The court held that jury agreement is not required on "use" as opposed to "threat" or on "force" as opposed to "violence." Thus, instructing the jury in the disjunctive is acceptable in this instance, although the Committee recommends selecting one of the alternatives whenever the evidence supports only one.

3. "[T]he use or threat of force or violence element of second degree sexual assault includes forcible contact or force used as a means of making the sexual contact. Thus, the element is satisfied whether the force is used or threatened as part of the sexual contact itself or whether it is used or threatened before the sexual contact." State v. Hayes, 2003 WI App 99, ¶15, 264 Wis.2d 377, 633 N.W.2d 351, citing State v. Bonds, supra. (Affirmed, 2004 WI 80, 273 Wis.2d 1, 681 N.W.2d 203.)

4. State v. Hayes, 2004 WI 80, ¶59, 273 Wis.2d 1, 681 N.W.2d 203:

> The "use or threat of force or violence" element . . . is satisfied if the use or threat of force or violence is directed to compelling the victim's submission. The element is satisfied whether the force is used or threatened as part of the sexual contact or whether it is used or threatened as part of the sexual contact to compel the victim's submission.

5. State v. Jaworski, 135 Wis.2d 235, 239-40, 400 N.W.2d 29 (Ct. App. 1986):

> [W]e reject Jaworski's argument that . . . the state must therefore establish a separate threat for each count charged.
>
> . . . The crucial inquiry is whether on each date sexual intercourse was achieved by threat of violence.
>
> . . .
>
> A reasonable trier of fact could well conclude . . . that the initial threat of violence lingered on the latter dates. . . Part of S.H.'s fear may also have been attributable to Jaworski's alleged threats to tell other inmates as well as S.H.'s family and friends what had happened. However, that fact does not preclude a finding that the original threat of violence continued to weigh upon S.H. and caused him to cooperate out of fear for his safety.

State v. Speese, 191 Wis.2d 205, 213-14, 528 N.W.2d 63 (Ct. App. 1995):

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In State v. Jaworski, . . . we held that a reasonable trier of fact could infer that an initial threat of violence, made two to five days earlier than the charged sexual assaults, had lingered on the days the charged assaults occurred, and that the earlier threat had caused the victim to submit out of fear. . . .

Speese . . . asserts that her subjective fear was unreasonable and insufficient to prove the threat or use of force. We disagree.

The jury could infer from the evidence that Teresa had good reason to fear Speese, he having used force on her on at least one prior occasion when she refused to have sexual intercourse with him. The fact finder may take into account the context of the threat. . . The context here is the relationship between Speese and Teresa and their respective ages. The relationship of some ten years' duration is between a stepfather and his juvenile female stepchild whom he has sexually abused throughout the period and beaten.

6. State v. Bonds, 165 Wis.2d 27, 32, 477 N.W.2d 265 (1991):

. . . Section 940.225(2)(a) does not state that the force used or threatened may not be the force employed in the actual nonconsensual contact. Nor does it state that the force must be directed toward compelling the victim's submission. The phrase "by use of force" includes forcible contact or the force used as the means of making contact.

. . . Force used at the time of the contact can compel submission as effectively as force or threat occurring before contact. Regardless of when the force is applied, the victim is forced to submit. When force is used at the time of contact, the victim has no choice at the moment of simultaneous use of force and making of contact. When force is used before contact, the choice is forced. In both cases, the victim does not consent to the contact.

7. Section 940.225(1)(c) states that the defendant must have been aided or abetted and have sexual contact or sexual intercourse without consent by use or threat of force or violence. The nature of the connection between being aided and having intercourse or contact is not clear. The earlier version of this instruction tried to express this connection by stating that the aiding and abetting must have "compelled the victim to submit" to the sexual assault.

This issue was discussed in State v. Thomas, 128 Wis.2d 93, 104-05, 381 N.W.2d 567 (Ct. App. 1985). In Thomas, the 1983 version of Wis JI-Criminal 1204, and relevant footnotes, were cited by the defendant in support of his argument that the statute was intended to apply only to the "gang rape situation." The Thomas court rejected the argument, holding that "aiding and abetting" has the same meaning in § 940.225(1)(c) as it has in § 939.05. Since the Committee had not intended to suggest a different result, the 1988 revision deleted the "compelled the victim to submit" language and revised the aiding and abetting explanation to track closely the one used for purposes of § 939.05.

8. The definition of "consent," found in Wis. Stat. § 940.225(4), applies to prosecutions under § 940.225. The definition of "without consent," found in § 939.22(48), is applicable to other Criminal Code offenses but does not apply to prosecutions under § 940.225. Section 940.225(4) reads as follows:

"Consent," as used in this section, means words or overt actions by a person who is competent to give informed consent indicating a freely given agreement to have sexual intercourse or sexual

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contact. Consent is not an issue in alleged violations of subs. (2)(c), (cm), (d), (g), (h) and (I). The following persons are presumed incapable of consent but the presumption may be rebutted by competent evidence, subject to the provisions of § 972.11(2):

(b) A person suffering from a mental illness or defect which impairs capacity to appraise personal conduct.

(c) A person who is unconscious or for any other reason is physically unable to communicate unwillingness to an act.

The definition of "without consent" used in the instruction is designed for the usual case where no special circumstances recognized by the statute as affecting consent are present. If the evidence raises an issue about the victim's being "competent to give informed consent," being unconscious, or being mentally ill, see Wis JI-Criminal 1200C, 1200D, and 1200E, which provide alternatives for these special circumstances.

The instruction on "without consent" rephrases the statutory definition in the interest of clarifying it for the jury. First, it states the element in the active voice by requiring that the victim did not consent. Second, the Committee concluded that it was more clear to refer to consent as a freely given agreement which may be shown by words or actions rather than to reiterate the statute which refers to consent as "words or overt actions indicating a freely given agreement." No change in meaning is intended. It is more direct to speak of consent as an agreement, evidence of which may be provided by words or actions of the victim, along with the other facts concerning the incident.

If the jury finds that the victim did not in fact consent, it apparently is no defense that the defendant believed there was consent, even if the defendant's belief is reasonable. This is the case because Wis. Stat. § 940.225 uses none of the "intent words" which indicate that the defendant's knowledge of no consent is an element of the crime, see Wis. Stat. § 939.23.

9. See State v. Lederer, 99 Wis.2d 430, 299 N.W.2d 457 (Ct. App. 1980); State v. Clark, 89 Wis.2d 804, 275 N.W.2d 715 (1979).

10. The use of the aiding and abetting concept in § 940.225(1)(c) is somewhat different from that of traditional criminal statutes, because this statute provides for increased penalty for the principal actor where the actor is aided by others. The usual situation, for example, Wis. Stat. § 939.05(2)(b), Parties to Crime, involves defining the culpability of the aider and abettor. For further definition of "aiding and abetting," see Wis JI-Criminal 400 and the 1953 Judiciary Committee Report on the Criminal Code, Comment to § 339.05.

The requirement that the aider(s) must have known that the defendant was committing the sexual assault is added to the instruction on the basis of the definition of the aider's culpability in § 939.05. Section 939.05 refers to "intentionally aid and abets," which has been interpreted as "acting with knowledge or belief that another person is committing or intends to commit a crime." The Committee also concluded that the defendant must know of the aider's presence or willingness to assist.

Another question arising under this subsection relates to the liability of the aider. Is the aider guilty of first or second degree sexual assault? If aiding is established, the principal is guilty of the first degree

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offense. Usually, the aider is guilty of the same offense as the principal. In the sexual assault case, however, the crime the aider intended to aid was arguably a second degree offense, Sexual Contact or Intercourse Without Consent by use or threat of force or violence under § 940.225(2)(a). The aiding is the only factor that elevates the offense as far as the principal is concerned. Does it also increase the seriousness for the aider? The Wisconsin Court of Appeals so held in State v. Curbello-Rodriguez, 119 Wis.2d 414, 351 N.W.2d 758 (Ct. App. 1984).

11. The sentence in brackets is recommended for use when the evidence raises an issue whether the person actually gave assistance or merely stood by without intending to assist.

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1206 FIRST DEGREE SEXUAL ASSAULT: SEXUAL INTERCOURSE WITH A PERSON 12 YEARS OF AGE OR YOUNGER — § 940.225(1)(d)

1207 FIRST DEGREE SEXUAL ASSAULT: SEXUAL CONTACT WITH A PERSON 12 YEARS OF AGE OR YOUNGER — § 940.225(1)(d)

[INSTRUCTIONS WITHDRAWN]

COMMENT

Wis JI-Criminal 1206 and 1207 were originally published in 1980 and were revised in 1983. The instructions were withdrawn in 1989.

These instructions were withdrawn because the statute with which they deal was repealed by 1987 Wisconsin Act 332, effective July 1, 1989. The same legislation recreated essentially the same offenses in § 948.02(1), First Degree Sexual Assault Of A Child. See Wis JI-Criminal 2102 and 2103.

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1208 SECOND DEGREE SEXUAL ASSAULT: SEXUAL CONTACT OR INTERCOURSE WITHOUT CONSENT BY USE OR THREAT OF FORCE OR VIOLENCE — § 940.225(2)(a)

Statutory Definition of the Crime

Second degree sexual assault, as defined in § 940.225(2)(a) of the Criminal Code of Wisconsin, is committed by one who has sexual [contact] [intercourse] with another person without consent and by use or threat of force or violence.

State's Burden of Proof

Before you may find the defendant guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following three elements were present.

Elements of the Crime That the State Must Prove

1. The defendant had sexual [contact] [intercourse] with (name of victim).
2. (Name of victim) did not consent to the sexual [contact] [intercourse].
3. The defendant had sexual [contact] [intercourse] with (name of victim) by use or threat of force or violence.[1]

   The use or threat of force or violence may occur before or as part of the sexual (contact) (intercourse).[2]

   SELECT THE ALTERNATIVES SUPPORTED BY THE EVIDENCE

   [This element is satisfied if the use or threat of force or violence compelled (name of victim) to submit.][3]

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[Use or threat of force or violence on one date can carry over to an alleged sexual assault on a later date if the use or threat of force or violence continued to weigh on (name of victim) and caused (him) (her) to cooperate out of fear for (his) (her) safety.][4]

[The phrase "by use of force" includes forcible sexual contact or force used as the means of making sexual contact.][5]

Meaning of ["Sexual Contact"] ["Sexual Intercourse"]

REFER TO WIS JI-CRIMINAL 1200A FOR DEFINITION OF "SEXUAL CONTACT" AND WIS JI-CRIMINAL 1200B FOR DEFINITION OF "SEXUAL INTERCOURSE" AND INSERT THE APPROPRIATE DEFINITION HERE.

Meaning of "Did Not Consent"[6]

"Did not consent" means that (name of victim) did not freely agree to have sexual [contact] [intercourse] with the defendant. In deciding whether (name of victim) did not consent, you should consider what (name of victim) said and did, along with all the other facts and circumstances. This element does not require that (name of victim) offered physical resistance.[7]

Jury's Decision

If you are satisfied beyond a reasonable doubt that all three elements of second degree sexual assault have been proved, you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.

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COMMENT

This instruction was originally published in 1980 as Wis JI-Criminal 1208 [for sexual intercourse offenses] and Wis JI-Criminal 1209 [for sexual contact offenses]. Those instructions were revised in 1983 and 1990. A revision combining the instructions as Wis JI-Criminal 1208 was published in 1996 and revised in 2002, 2004, and 2005. This revision was approved by the Committee in June 2015; it involved a nonsubstantive change in the text and an addition to footnote 3.

The instruction provides for inserting definitions of "sexual contact" and "sexual intercourse" provided in Wis JI-Criminal 1200A and 1200B. That definitional material was formerly included in the text of each offense instruction. When a new alternative was added to the statutory definition of sexual contact by 1995 Wisconsin Act 69, the Committee decided to modify its original approach by providing separate instructions for the definitions. The Committee believes that this will be more convenient to the users of the instructions, making it easier to prepare an instruction that is tailored to the facts of the case.

1. The phrase, "by use or threat of force or violence," as used in subsection (2)(a) of § 940.225, was construed in State v. Baldwin, 101 Wis.2d 441, 304 N.W.2d 742 (1981). The court held that jury agreement is not required on "use" as opposed to "threat" or on "force" as opposed to "violence." Thus, instructing the jury in the disjunctive is acceptable in this instance, although the Committee recommends selecting one of the alternatives whenever the evidence supports only one.

2. "[T]he use or threat of force or violence element of second degree sexual assault includes forcible contact or force used as a means of making the sexual contact. Thus, the element is satisfied whether the force is used or threatened as part of the sexual contact itself or whether it is used or threatened before the sexual contact." State v. Hayes, 2003 WI App 99, ¶15, 264 Wis.2d 377, 633 N.W.2d 351, citing State v. Bonds, supra. (Affirmed, 2004 WI 80, 273 Wis.2d 1, 681 N.W.2d 203.)

3. State v. Hayes, 2004 WI 80, ¶59, 273 Wis.2d 1, 681 N.W.2d 203:

> The "use or threat of force or violence" element . . . is satisfied if the use or threat of force or violence is directed to compelling the victim's submission. The element is satisfied whether the force is used or threatened as part of the sexual contact or whether it is used or threatened as part of the sexual contact to compel the victim's submission.

Also see, State v. Long, 2009 WI 36, 317 Wis.2d 92, 765 N.W.2d 557, where the court found that the evidence was sufficient to establish the "use of force" element: "force has been used when the victim is compelled to submit." 317 Wis.2d 92, 96.

4. State v. Jaworski, 135 Wis.2d 235, 239-40, 400 N.W.2d 29 (Ct. App. 1986):

> [W]e reject Jaworski's argument that . . . the state must therefore establish a separate threat for each count charged.
>
> . . . The crucial inquiry is whether on each date sexual intercourse was achieved by threat of violence.
>
> . . .
>
> A reasonable trier of fact could well conclude . . . that the initial threat of violence lingered on the latter dates. . . Part of S.H.'s fear may also have been attributable to Jaworski's alleged

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threats to tell other inmates as well as S.H.'s family and friends what had happened. However, that fact does not preclude a finding that the original threat of violence continued to weigh upon S.H. and caused him to cooperate out of fear for his safety.

State v. Speese, 191 Wis.2d 205, 213-14, 528 N.W.2d 63 (Ct. App. 1995):

In State v. Jaworski, . . . we held that a reasonable trier of fact could infer that an initial threat of violence, made two to five days earlier than the charged sexual assaults, had lingered on the days the charged assaults occurred, and that the earlier threat had caused the victim to submit out of fear. . . .

Speese . . . asserts that her subjective fear was unreasonable and insufficient to prove the threat or use of force. We disagree.

The jury could infer from the evidence that Teresa had good reason to fear Speese, he having used force on her on at least one prior occasion when she refused to have sexual intercourse with him. The fact finder may take into account the context of the threat. . . The context here is the relationship between Speese and Teresa and their respective ages. The relationship of some ten years' duration is between a stepfather and his juvenile female stepchild whom he has sexually abused throughout the period and beaten.

5. State v. Bonds, 165 Wis.2d 27, 32, 477 N.W.2d 265 (1991):

. . . Section 940.225(2)(a) does not state that the force used or threatened may not be the force employed in the actual nonconsensual contact. Nor does it state that the force must be directed toward compelling the victim's submission. The phrase "by use of force" includes forcible contact or the force used as the means of making contact.

. . . Force used at the time of the contact can compel submission as effectively as force or threat occurring before contact. Regardless of when the force is applied, the victim is forced to submit. When force is used at the time of contact, the victim has no choice at the moment of simultaneous use of force and making of contact. When force is used before contact, the choice is forced. In both cases, the victim does not consent to the contact.

6. The definition of "consent," found in Wis. Stat. § 940.225(4), applies to prosecutions under § 940.225. The definition of "without consent," found in § 939.22(48), is applicable to other Criminal Code offenses but does not apply to prosecutions under § 940.225. Section 940.225(4) reads as follows:

"Consent," as used in this section, means words or overt actions by a person who is competent to give informed consent indicating a freely given agreement to have sexual intercourse or sexual contact. Consent is not an issue in alleged violations of subs. (2)(c), (cm), (d), (g), (h) and (i). The following persons are presumed incapable of consent but the presumption may be rebutted by competent evidence, subject to the provisions of § 972.11(2):

(b) A person suffering from a mental illness or defect which impairs capacity to appraise personal conduct.

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(c) A person who is unconscious or for any other reason is physically unable to communicate unwillingness to an act.

The definition of "without consent" used in the instruction is designed for the usual case where no special circumstances recognized by the statute as affecting consent are present. If the evidence raises an issue about the victim's being "competent to give informed consent," being unconscious, or being mentally ill, see Wis JI-Criminal 1200C, 1200D, and 1200E, which provide alternatives for these special circumstances.

The instruction on "without consent" rephrases the statutory definition in the interest of clarifying it for the jury. First, it states the element in the active voice by requiring that the victim did not consent. Second, the Committee concluded that it was more clear to refer to consent as a freely given agreement which may be shown by words or actions rather than to reiterate the statute which refers to consent as "words or overt actions indicating a freely given agreement." No change in meaning is intended. It is more direct to speak of consent as an agreement, evidence of which may be provided by words or actions of the victim, along with the other facts concerning the incident.

If the jury finds that the victim did not in fact consent, it apparently is no defense that the defendant believed there was consent, even if the defendant's belief is reasonable. This is the case because Wis. Stat. § 940.225 uses none of the "intent words" which indicate that the defendant's knowledge of no consent is an element of the crime, see Wis. Stat. § 939.23.

7. See State v. Lederer, 99 Wis.2d 430, 299 N.W.2d 457 (Ct. App. 1980); State v. Clark, 89 Wis.2d 804, 275 N.W.2d 715 (1979).

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1209 SECOND DEGREE SEXUAL ASSAULT: SEXUAL CONTACT OR INTERCOURSE WITHOUT CONSENT CAUSING INJURY, ILLNESS, DISEASE OR IMPAIRMENT OF A SEXUAL OR REPRODUCTIVE ORGAN, OR MENTAL ANGUISH REQUIRING PSYCHIATRIC CARE — § 940.225(2)(b)

Statutory Definition of the Crime

Second degree sexual assault, as defined in § 940.225(2)(b) of the Criminal Code of Wisconsin, is committed by one who has sexual [contact] [intercourse] with another person without consent and causes (injury) (illness) (disease or impairment of a sexual or reproductive organ) (mental anguish requiring psychiatric care).

State's Burden of Proof

Before you may find the defendant guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following three elements were present.

Elements of the Crime That the State Must Prove

1. The defendant had sexual [contact] [intercourse] with (name of victim).
2. (Name of victim) did not consent to the sexual [contact] [intercourse].
3. The defendant caused (injury to (name of victim)) (illness to (name of victim)) (disease or impairment of a sexual or reproductive organ of (name of victim)) (mental anguish requiring psychiatric care for (name of victim)).[1]

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Meaning of ["Sexual Contact"] ["Sexual Intercourse"]

REFER TO WIS JI-CRIMINAL 1200A FOR DEFINITION OF "SEXUAL CONTACT" AND WIS JI-CRIMINAL 1200B FOR DEFINITION OF "SEXUAL INTERCOURSE" AND INSERT THE APPROPRIATE DEFINITION HERE.

Meaning of "Did Not Consent"[2]

"Did not consent" means that (name of victim) did not freely agree to have sexual [contact] [intercourse] with the defendant. In deciding whether (name of victim) did not consent, you should consider what (name of victim) said and did, along with all the other facts and circumstances. This element does not require that (name of victim) offered physical resistance.[3]

Jury's Decision

If you are satisfied beyond a reasonable doubt that all three elements of second degree sexual assault have been proved, you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.

COMMENT

This instruction was originally published in 1980 as Wis JI-Criminal 1210 [for sexual intercourse offenses] and Wis JI-Criminal 1211 [for sexual contact offenses]. Those instructions were revised in 1983 and 1990. A revision combining the instructions as Wis JI-Criminal 1209 was published in 1996 and revised in 2001. This revision was approved by the Committee in June 2008 and involved revision of footnote 1.

The revised instruction provides for inserting definitions of "sexual contact" and "sexual intercourse" provided in Wis JI-Criminal 1200A and 1200B. That definitional material was formerly included in the text of each offense instruction. When a new alternative was added to the statutory definition of sexual contact by 1995 Wisconsin Act 69, the Committee decided to modify its original approach by providing separate instructions for the definitions. The Committee believes that this will be more convenient to the users of the instructions, making it easier to prepare an instruction that is tailored to the facts of the case.

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1. No further definition is attempted for any of the alternatives for this element. Before the 2008 revision, the text referred to "bodily injury." The Committee decided to delete "bodily" because it does not appear in the definition of the offense and may invite problems in connection with defining "injury." "Injury" is not defined in the sexual assault statute, in the general definitions provided in Chapter 939, or by a published court decision. While the Criminal Code uses the closely related term "bodily harm," caution should be used in equating the two because unpublished decisions of the Wisconsin Court of Appeals have reached conflicting results, focusing on whether "pain" is sufficient to constitute "injury." In a prosecution under § 940.225(2)(b), the court held that the trial court erred in defining "injury" using the Criminal Code definition of "bodily harm" [see § 939.22(4)] because "injury" does not include "pain." State v. Gonzalez, No. 2006AP2977-CR, March 20, 2008. [Ordered not published, April 30, 2008.] However, in a prosecution under § 346.63(2)(a), where "injury" is also used, the court held that the word "injury" encompasses physical pain. State v. Maddox, No. 03-0227-CR, July 8, 2003. [Ordered not published, August 27, 2003.] Neither of these decisions may be cited as authority because they were not published. See § 809.23(3). But they indicate the need for caution in equating "injury" with "bodily harm."

It is not clear what is intended by the reference in the statute to "sexual or reproductive organs." The phrase is not defined in the statutes or by prior case law, although the Sexual Assault Law uses the term "intimate parts" in defining sexual contact (§ 940.225(5)(b)). According to cases from other states, "sexual or reproductive organs" include the immediate vicinity of the genital organs as well as the organs themselves, State v. Nash, 83 N.H. 536, 145 A. 262 (N.H. 1929); and it does not include the breasts, State v. Moore, 194 Ore. 232, 241 P.2d 455 (Ore. 1952).

2. The definition of "consent," found in Wis. Stat. § 940.225(4), applies to prosecutions under § 940.225. The definition of "without consent," found in § 939.22(48), is applicable to other Criminal Code offenses but does not apply to prosecutions under § 940.225. Section 940.225(4) reads as follows:

> "Consent," as used in this section, means words or overt actions by a person who is competent to give informed consent indicating a freely given agreement to have sexual intercourse or sexual contact. Consent is not an issue in alleged violations of subs. (2)(c), (d) and (g). The following persons are presumed incapable of consent but the presumption may be rebutted by competent evidence, subject to the provisions of § 972.11(2):
>
> (b) A person suffering from a mental illness or defect which impairs capacity to appraise personal conduct.
> (c) A person who is unconscious or for any other reason is physically unable to communicate unwillingness to an act.

The definition of "without consent" used in the instruction is designed for the usual case where no special circumstances recognized by the statute as affecting consent are present. If the evidence raises an issue about the victim's being "competent to give informed consent," being unconscious, or being mentally ill, see Wis JI-Criminal 1200C, 1200D, and 1200E, which provide alternatives for these special circumstances.

The instruction on "without consent" rephrases the statutory definition in the interest of clarifying it for the jury. First, it states the element in the active voice by requiring that the victim did not consent. Second, the Committee concluded that it was more clear to refer to consent as a freely given agreement which may be shown by words or actions rather than to reiterate the statute which refers to consent as "words or overt

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actions indicating a freely given agreement." No change in meaning is intended. It is more direct to speak of consent as an agreement, evidence of which may be provided by words or actions of the victim, along with the other facts concerning the incident.

If the jury finds that the victim did not in fact consent, it apparently is no defense that the defendant believed there was consent, even if the defendant's belief is reasonable. This is the case because Wis. Stat. § 940.225 uses none of the "intent words" which indicate that the defendant's knowledge of no consent is an element of the crime, see Wis. Stat. § 939.23.

3. See State v. Lederer, 99 Wis.2d 430, 299 N.W.2d 457 (Ct. App. 1980); State v. Clark, 89 Wis.2d 804, 275 N.W.2d 715 (1979).

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1211 SECOND DEGREE SEXUAL ASSAULT: SEXUAL CONTACT OR INTERCOURSE WITH A PERSON SUFFERING FROM MENTAL ILLNESS — § 940.225(2)(c)

Statutory Definition of the Crime

Second degree sexual assault, as defined in § 940.225(2)(c) of the Criminal Code of Wisconsin, is committed by one who has sexual [contact] [intercourse] with a person who suffers from a mental illness or deficiency which renders that person temporarily or permanently incapable of appraising the person's conduct, and the defendant knows of such condition.

State's Burden of Proof

Before you may find the defendant guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following four elements were present.

Elements of the Crime That the State Must Prove

1. The defendant had sexual [contact] [intercourse] with (name of victim).
2. (Name of victim) suffered from a mental (illness) (deficiency) at the time of the sexual [contact] [intercourse].[1]
3. The mental (illness) (deficiency) rendered (name of victim) temporarily or permanently incapable of appraising her[2] conduct. In other words, (name of victim) must have lacked the ability to evaluate the significance of her conduct because of her mental (illness) (deficiency).[3]

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4. The defendant knew that (name of victim) was suffering from a mental (illness) (deficiency) and knew that the mental condition rendered (name of victim) temporarily or permanently incapable of appraising her conduct.[4]

Meaning of ["Sexual Contact"] ["Sexual Intercourse"]

REFER TO WIS JI-CRIMINAL 1200A FOR DEFINITION OF "SEXUAL CONTACT" AND WIS JI-CRIMINAL 1200B FOR DEFINITION OF "SEXUAL INTERCOURSE" AND INSERT THE APPROPRIATE DEFINITION HERE.

ADD THE FOLLOWING IF THERE IS EVIDENCE RELATING TO THE VICTIM'S CONDUCT THAT IS RELEVANT TO THE THIRD OR FOURTH ELEMENTS.[5]

[Use of Consent Evidence]

[Consent to sexual (contact) (intercourse) is not a defense. However, you may consider any words or actions of (name of victim) indicating consent in determining (whether (name of victim) was suffering from a mental (illness) (deficiency) that rendered her incapable of appraising her conduct) (or) (whether the defendant knew that (name of victim) was suffering from a mental (illness) (deficiency) that rendered her incapable of appraising her conduct).]

Jury's Decision

If you are satisfied beyond a reasonable doubt that all four elements of second degree sexual assault have been proved, you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.

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COMMENT

This instruction was originally published in 1980 as Wis JI-Criminal 1212 [for sexual intercourse offenses] and Wis JI-Criminal 1213 [for sexual contact offenses]. Those instructions were revised in 1983, 1990, and 1993. A revision combining the instructions as Wis JI-Criminal 1211 was published in 1996 and revised in 1998 and 2002. This revision was approved by the Committee in March 2015; it updated the Comment and footnotes.

The instruction provides for inserting definitions of "sexual contact" and "sexual intercourse" provided in Wis JI-Criminal 1200A and 1200B. That definitional material was formerly included in the text of each offense instruction. When a new alternative was added to the statutory definition of sexual contact by 1995 Wisconsin Act 69, the Committee decided to modify its original approach by providing separate instructions for the definitions. The Committee believes that this will be more convenient to the users of the instructions, making it easier to prepare an instruction that is tailored to the facts of the case.

Section 940.225(2)(c) provides that it is second degree sexual assault if one "[h]as sexual contact or sexual intercourse with a person who suffers from a mental illness or deficiency which renders that person temporarily or permanently incapable of appraising the person's conduct, and the defendant knows of such condition." This offense is similar to a violation under § 940.225(3), Third Degree Sexual Assault, which prohibits sexual intercourse without consent, where, in satisfying the consent element, the state relies on the presumption of no consent under § 940.225(4)(b), which applies where the victim "suffers from a mental illness or defect which impairs capacity to appraise personal conduct." This statement in subsection (4)(b) is almost identical to the wording of § 940.225(2)(c) but is not exactly the same.

The distinguishing feature of the more serious offense under subsection (2)(c) is that the defendant must know of the victim's mental illness or deficiency. Such knowledge is not required where the presumption applies under subsection (4)(b), so in this sense the subsection (2)(c) offense requires greater proof than does the offense under subsection (3). However, "without consent" is not an element of the (2)(c) offense, while it is an element of the (3) offense. Each offense therefore requires proof of an element that the other does not, although the victim could be essentially the same under either offense. Therefore, under the strict Wisconsin test (see § 939.66 and Randolph v. State, 83 Wis.2d 630, 266 N.W.2d 334 (1978)), third degree sexual assault apparently cannot be a lesser included offense of a crime charged under subsec. (2)(c).

1. The Committee decided not to define "mental illness or deficiency" in the uniform instruction. Existing statutory definitions did not seem suitable because they are written in the context of determining when treatment is required or when involuntary commitment of the mentally ill person is appropriate. (See, for example, Wis. Stat. § 51.01(13)(a) and (b) and § 51.75(2)(c) and (d).) For the purposes of the Sexual Assault Law, the Committee concluded that the term "mental illness or deficiency" has a meaning within the common understanding of the jury. Additional guidance as to the type of illness or deficiency required is offered by the qualifying phrase in the statute: ". . . which renders that person temporarily or permanently incapable of appraising the person's conduct."

In State v. Perkins, 2004 WI App 213, ¶19, 277 Wis.2d 243, 689 N.W.2d 684, the court of appeals court cited the discussion above with apparent approval. The court held that "[W]hen, as here, there is lay opinion testimony supported by ample testimony as to the victim's behavior, the existence of a mental illness or deficiency that rendered the victim temporarily or permanently incapable of appraising his or her conduct can be established without the presentation of expert testimony." Also see State v. Onyeukwu,

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2104AP518-CR, [not published] for an example of a decision finding the evidence sufficient to establish "mental deficiency" based on evidence showing that the 22-year old victim "was probably functioning on a sixth-grade level." ¶16.

2. The Committee finds that it is possible to avoid using a gender-specific pronoun in almost all situations. However, eliminating it in this situation proved to be extremely difficult. Thus, the text uses "her" in both the third and fourth elements and in the summary paragraph at the end of the instruction. Obviously, the sexual assault law is gender neutral; if the victim is a male "her" must be changed to "him."

3. This is an attempt to elaborate on the meaning of "rendered the person temporarily or permanently incapable of appraising the person's conduct." It is adapted from the discussion in State v. Smith, 215 Wis.2d 84, 94, 572 N.W.2d 496 (Ct. App. 1997).

4. Section 940.225(2)(c) requires that the defendant know of the victim's condition. The Committee concluded that this requires knowledge of the existence of the mental illness or deficiency and knowledge that the illness or deficiency "renders the person temporarily or permanently incapable of appraising the person's conduct."

5. Section 940.225(4) provides in part: "Consent is not an issue in alleged violations of sub. (2)(c), (d) and (g)." Thus, "without consent" is not an element of this offense and consent is not a defense. The Committee concluded it may be helpful to advise the jury of that fact.

While consent is not a defense as such, evidence of facts indicating that the victim appeared to give consent might be relevant to other elements of the crime: whether the victim was mentally incapable of appraising her conduct; and, whether the defendant knew that the victim was suffering from a mental illness that rendered her incapable of appraising her conduct.

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1212 SECOND DEGREE SEXUAL ASSAULT: SEXUAL CONTACT OR INTERCOURSE WITH A PERSON WHO IS UNDER THE INFLUENCE OF AN INTOXICANT — § 940.225(2)(cm)

Statutory Definition of the Crime

Second degree sexual assault, as defined in § 940.225(2)(cm) of the Criminal Code of Wisconsin, is committed by one who has sexual [contact] [intercourse] with a person who is under the influence of an intoxicant to a degree which renders that person incapable of giving consent if the defendant has actual knowledge that the person is incapable of giving consent and has the purpose to have sexual [contact] [intercourse] with the person while the person is incapable of giving consent.

State's Burden of Proof

Before you may find the defendant guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following five elements were present.

Elements of the Crime That the State Must Prove

1. The defendant had sexual [contact] [intercourse] with (name of victim).
2. (Name of victim) was under the influence of an intoxicant at the time of the sexual [contact] [intercourse].

   [_____ is an intoxicant.][1]

   ["Intoxicant" means any alcohol beverage, hazardous inhalant, controlled substance, controlled substance analog or other drug, any combination thereof.][2]

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3. (Name of victim) was under the influence of an intoxicant to a degree which rendered (him) (her) incapable of giving consent.

   This requires that (name of victim) was incapable of giving freely given agreement to engage in sexual (intercourse) (contact).[3]

4. The defendant had actual knowledge[4] that (name of victim) was incapable of giving consent.

5. The defendant had the purpose to have sexual [contact] [intercourse] while (name of victim) was incapable of giving consent.[5]

Meaning of ["Sexual Contact"] ["Sexual Intercourse"]

REFER TO WIS JI-CRIMINAL 1200A FOR DEFINITION OF "SEXUAL CONTACT" AND WIS JI-CRIMINAL 1200B FOR DEFINITION OF "SEXUAL INTERCOURSE" AND INSERT THE APPROPRIATE DEFINITION HERE.

Deciding About Purpose and Actual Knowledge

You cannot look into a person's mind to find purpose and actual knowledge. Purpose and actual knowledge must be found, if found at all, from the defendant's acts, words, and statements, if any, and from all the facts and circumstances in this case bearing upon purpose and actual knowledge.

Jury's Decision

If you are satisfied beyond a reasonable doubt that all five elements of second degree sexual assault have been proved, you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.

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COMMENT

Wis JI-Criminal 1212 was originally published in 1998 and revised in 2002 and 2007. This revision was approved by the Committee in February 2014.

The instruction provides for inserting definitions of "sexual contact" and "sexual intercourse" provided in Wis JI-Criminal 1200A and 1200B. That definitional material was formerly included in the text of each offense instruction. When a new alternative was added to the statutory definition of sexual contact by 1995 Wisconsin Act 69, the Committee decided to modify its original approach by providing separate instructions for the definitions. The Committee believes that this will be more convenient to the users of the instructions, making it easier to prepare an instruction that is tailored to the facts of the case.

Section 940.225(2)(cm) was created by 1997 Wisconsin Act 220 (effective date: May 14, 1998). It originally provided that it was second degree sexual assault if one "[h]as sexual contact or sexual intercourse with a person who is under the influence of an intoxicant to a degree which renders that person incapable of appraising the person's conduct, and the defendant knows of such condition." Although the statute referred to "intoxicant," alcohol, the most common intoxicant, was excluded from the definition. The original statute was apparently intended to address the so-called date rape drugs such as "gamma hydroxybutyrate" or "GHB," "gamma hydroxybutyrolactone" or "GBL," ketamine, or flunitrazepam, the possession of which was also criminalized by the same legislation creating this sexual assault offense. See § 961.41(3g)(f) as created by 1997 Wisconsin Act 220.

Section 940.225(2)(cm) was amended by 2005 Wisconsin Act 436 (effective date: June 6, 2006). Act 436 made the following changes:

- it included "alcohol beverage" in the definition of "intoxicant" in sub. (5)(ai);
- it changed "incapable of appraising the person's conduct" to "incapable of giving consent";
- it restated the knowledge requirement as "has actual knowledge that the person is incapable of giving consent"; and,
- it added: "and the defendant has the purpose to have sexual contact or sexual intercourse with the person while the person is incapable of giving consent."

Section 940.225(2)(cm) was further amended by 2013 Wisconsin Act 83 [effective date: Dec. 14, 2013] to add "hazardous inhalant" to the definition of "intoxicant." Act 83 also created a definition of "hazardous inhalant" in § 939.22(15). For a model tailored to Motor Vehicle Code offenses involving a "hazardous inhalant," see Wis JI-Criminal 2667.

1. If the charging document specifies one of the substances that qualifies as an "intoxicant" under § 940.225(5)(ai), the Committee suggests simply telling the jury that, for example: "A controlled substance is an intoxicant." If one of the alternatives is not specified or if reading the full statutory definition is believed to be preferable, that definition is provided in the second set of brackets.

2. This is the definition of "intoxicant" in § 940.223(5)(ai). The definition was revised by 2005 Wisconsin Act 436 to include "alcohol beverage" as an "intoxicant." It was further revised by 2013 Wisconsin Act 83 to include "hazardous inhalant."

3. 2005 Wisconsin Act 436 amended s. 940.225(2)(cm) to refer to the victim being under the influence to a degree which renders that person "incapable of giving consent" in place of "rendered the person incapable

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of appraising the person's conduct." The statement in the instruction incorporates the key parts of the definition of "consent" in s. 940.225(4).

Act 436 did not amend the second sentence of s. 940.225(4), which provides that "consent is not an issue in alleged violations of sub. (2)(c), (cm) . . ." While "without consent" is not an element of this offense, evidence relating to consent may be relevant to the elements that refer to the victim being incapable of giving consent. Thus, the revised instruction does not include the statement found in the prior version that informs the jury that "consent is not a defense." See, for example, Wis JI-Criminal 1211.

4. Section 940.225(2)(cm), as amended by 2005 Wisconsin Act 436, requires that the defendant "has actual knowledge that the person is incapable of giving consent." "Actual knowledge" replaced "knows" used in the prior version of the statute. The Committee interprets this change as emphasizing the subjective nature of the mental element required for this offense.

5. Section 940.225(2)(cm), as amended by 2005 Wisconsin Act 436, requires that the defendant "has the purpose to have sexual contact or sexual intercourse with the person while the person is incapable of giving consent." The 2006 revision of the instruction added the fifth element to reflect this addition to the statutory definition.

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1213 SECOND DEGREE SEXUAL ASSAULT: SEXUAL CONTACT OR INTERCOURSE WITH A PERSON THE DEFENDANT KNOWS IS UNCONSCIOUS — § 940.225(2)(d)

Statutory Definition of the Crime

Second degree sexual assault, as defined in § 940.225(2)(d) of the Criminal Code of Wisconsin, is committed by one who has sexual [contact] [intercourse] with a person who the defendant knows is unconscious.

State's Burden of Proof

Before you may find the defendant guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following three elements were present.

Elements of the Crime That the State Must Prove

1. The defendant had sexual [contact] [intercourse] with (name of victim).
2. (Name of victim) was unconscious[1] at the time of the sexual [contact] [intercourse].
3. The defendant knew that (name of victim) was unconscious at the time of the sexual [contact] [intercourse].[2]

Meaning of ["Sexual Contact"] ["Sexual Intercourse"]

REFER TO WIS JI-CRIMINAL 1200A FOR DEFINITION OF "SEXUAL CONTACT" AND WIS JI-CRIMINAL 1200B FOR DEFINITION OF "SEXUAL INTERCOURSE" AND INSERT THE APPROPRIATE DEFINITION HERE.

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ADD THE FOLLOWING IF THERE IS EVIDENCE RELATING TO THE VICTIM'S CONDUCT THAT IS RELEVANT TO THE SECOND OR THIRD ELEMENTS.[3]

[Use of Consent Evidence]

[Consent to sexual (contact) (intercourse) is not a defense. However, you may consider any words or actions of (name of victim) indicating consent in determining (whether (name of victim) was unconscious) (or) (whether the defendant knew that (name of victim) was unconscious).]

Jury's Decision

If you are satisfied beyond a reasonable doubt that all three elements of second degree sexual assault have been proved, you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.

COMMENT

This instruction was originally published in 1980 as Wis JI-Criminal 1214 [for sexual intercourse offenses] and Wis JI-Criminal 1215 [for sexual contact offenses]. Those instructions were revised in 1983, 1990, and 1993. A revision combining the instructions as Wis JI-Criminal 1213 was published in 1996 and revised in 1998. This revision was approved by the Committee in December 2001 and involved adoption of a new format and nonsubstantive changes to the text.

The revised instruction provides for inserting definitions of "sexual contact" and "sexual intercourse" provided in Wis JI-Criminal 1200A and 1200B. That definitional material was formerly included in the text of each offense instruction. When a new alternative was added to the statutory definition of sexual contact by 1995 Wisconsin Act 69, the Committee decided to modify its original approach by providing separate instructions for the definitions. The Committee believes that this will be more convenient to the users of the instructions, making it easier to prepare an instruction that is tailored to the facts of the case.

Section 940.225(2)(d) provides that it is second degree sexual assault if one "[h]as sexual contact or sexual intercourse with a person who defendant knows is unconscious." This offense is similar to a violation under § 940.225(3), Third Degree Sexual Assault, which prohibits sexual intercourse without consent, where, in satisfying the consent element, the state relies on the presumption of no consent under § 940.225(4)(c),

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which applies where the victim "is unconscious or for any other reason unable to communicate unwillingness to an act." This statement in subsection (4)(c) appears to be the equivalent of the wording of § 940.225(2)(d).

The distinguishing feature of the more serious offense under subsection (2)(d) is that the defendant must know of the victim's unconscious condition. Such knowledge is not required where the presumption applies under subsection (4)(c), so in this sense the subsection (2)(d) offense requires greater proof than does the offense under subsection (3). However, "without consent" is not an element of the (2)(d) offense although it is an element of the (3) offense. Each offense therefore requires proof of an element that the other does not, although the victim could be essentially the same under either offense. Under the strict Wisconsin test (see § 939.66 and Randolph v. State, 83 Wis.2d 630, 266 N.W.2d 334 (1978)), third degree sexual assault apparently cannot be a lesser included offense of a crime charged under subsec. (2)(d).

1. The statute does not define "unconscious." The Committee decided not to include a definition in the text of the instruction because a definition would be most helpful if tied to the facts of the case. When a case involves a substantial question about the meaning of "unconscious," the following material may be helpful.

Webster's New Collegiate Dictionary defines "unconscious" as "not knowing or perceiving, or being unaware." The Committee believes the common meaning of unconscious includes the loss of awareness caused by intoxication, the taking of drugs, or heavy sleep. In State v. Curtis, 144 Wis.2d 691, 695-96, 424 N.W.2d 719 (Ct. App. 1988), the court held that "unconscious" under § 940.225(2)(a) includes "a loss of awareness which may be caused by sleep" and that it was proper for the trial court to instruct the jury in those terms.

The constitutionality of § 940.225(2)(d) was upheld in State v. Pittman, 174 Wis.2d 255, 496 N.W.2d 74 (1993). The court held that the statutory standard "provides clear notice that sexual intercourse with a person who is asleep is illegal." 174 Wis.2d 255, 277. Further, the statute "provides an objective standard for those applying the law," ibid., since sleep is within the common knowledge of the jury. (The jury in Pittman was instructed, in accord with Curtis, supra, that "unconsciousness is a loss of awareness which may be caused by sleep.") Pittman also affirmed the exclusion of expert testimony on the effects of alcohol on sleep and consciousness, holding that it was irrelevant and tended to convey to the jury the expert's belief that the complaining witness was lying.

2. Knowledge that the victim is unconscious is expressly required by § 940.225(2)(d).

3. Section 940.225(4) provides in part: "Consent is not an issue in alleged violations of sub. (2)(c), (cm), (d) and (g)." Thus, "without consent" is not an element of this offense and consent is not a defense. The Committee concluded it may be helpful to advise the jury of that fact.

While consent is not a defense as such, evidence of facts indicating that the victim appeared to give consent might be relevant to other elements of the crime: whether the victim was incapable of appraising her conduct; and, whether the defendant knew that the victim was under the influence to a degree that rendered her incapable of appraising her conduct.

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1214 SECOND DEGREE SEXUAL ASSAULT: SEXUAL CONTACT OR INTERCOURSE WITHOUT CONSENT WHILE AIDED AND ABETTED — § 940.225(2)(f)

Statutory Definition of the Crime

Second degree sexual assault, as defined in § 940.225(2)(f) of the Criminal Code of Wisconsin, is committed by one who has sexual [contact] [intercourse] with another person without consent and is aided and abetted[1] by one or more other persons.

State's Burden of Proof

Before you may find the defendant guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following three elements were present.

Elements of the Crime That the State Must Prove

1. The defendant had sexual [contact] [intercourse] with (name of victim).
2. (Name of victim) did not consent to the sexual [contact] [intercourse].
3. The defendant was aided and abetted by one or more other persons.

Meaning of ["Sexual Contact"] ["Sexual Intercourse"]

REFER TO WIS JI-CRIMINAL 1200A FOR DEFINITION OF "SEXUAL CONTACT" AND WIS JI-CRIMINAL 1200B FOR DEFINITION OF "SEXUAL INTERCOURSE" AND INSERT THE APPROPRIATE DEFINITION HERE.

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Meaning of "Did Not Consent"[2]

"Did not consent" means that (name of victim) did not freely agree to have sexual [contact] [intercourse] with the defendant. In deciding whether (name of victim) did not consent, you should consider what (name of victim) said and did, along with all the other facts and circumstances. This element does not require that (name of victim) offered physical resistance.[3]

Meaning of "Aiding and Abetting"

The defendant was aided and abetted if another person knew that the defendant was having or intended to have sexual [contact] [intercourse] without consent and either:

- provided assistance to the defendant; or,
- was willing to assist the defendant if needed and the defendant knew of the willingness to assist.

Assistance may be provided by words, acts, encouragement, or support.[4]

ADD THE FOLLOWING IF RAISED BY THE EVIDENCE.[5]

[However, a person does not aid and abet if the person is only a bystander or spectator and does nothing to assist or encourage the commission of a crime.]

Jury's Decision

If you are satisfied beyond a reasonable doubt that all three elements of second degree sexual assault have been proved, you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.

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COMMENT

This instruction was originally published in 1988 as Wis JI-Criminal 1217.1 [for sexual intercourse offenses] and Wis JI-Criminal 1217.2 [for sexual contact offenses]. Those instructions were revised in 1990. A revision combining the instructions as Wis JI-Criminal 1214 was published in 1996. This revision was approved by the Committee in December 2001 and involved adoption of a new format and nonsubstantive changes to the text.

The revised instruction provides for inserting definitions of "sexual contact" and "sexual intercourse" provided in Wis JI-Criminal 1200A and 1200B. That definitional material was formerly included in the text of each offense instruction. When a new alternative was added to the statutory definition of sexual contact by 1995 Wisconsin Act 69, the Committee decided to modify its original approach by providing separate instructions for the definitions. The Committee believes that this will be more convenient to the users of the instructions, making it easier to prepare an instruction that is tailored to the facts of the case.

This offense was created by 1987 Wisconsin Act 245, effective date: April 21, 1988. A related offense is defined as first degree sexual assault by § 940.225(1)(c); it has the additional element of the "use or threat of force or violence." See Wis JI-Criminal 1205.

1. Section 940.225(2)(f) uses the phrase "aided <u>or</u> abetted" (emphasis added). Since traditional criminal statutes have referred to "aiding <u>and</u> abetting," the Committee has used that construction in the instruction. The Committee feels that this does not change the meaning of the statute or of the aiding and abetting concept. In <u>State v. Thomas</u>, 128 Wis.2d 93, 381 N.W.2d 567 (Ct. App. 1985), the court held that "aided or abetted" in § 940.225(1)(c) has the same meaning as the phrase "aids and abets" in § 939.05 and therefore is not unconstitutionally vague.

2. The definition of "consent," found in Wis. Stat. § 940.225(4), applies to prosecutions under § 940.225. The definition of "without consent," found in § 939.22(48), is applicable to other Criminal Code offenses but does <u>not</u> apply to prosecutions under § 940.225. Section 940.225(4) reads as follows:

> "Consent," as used in this section, means words or overt actions by a person who is competent to give informed consent indicating a freely given agreement to have sexual intercourse or sexual contact. Consent is not an issue in alleged violations of subs. (2)(c), (d) and (g). The following persons are presumed incapable of consent but the presumption may be rebutted by competent evidence, subject to the provisions of § 972.11(2):
>
> (b) A person suffering from a mental illness or defect which impairs capacity to appraise personal conduct.
> (c) A person who is unconscious or for any other reason is physically unable to communicate unwillingness to an act.

The definition of "without consent" used in the instruction is designed for the usual case where no special circumstances recognized by the statute as affecting consent are present. If the evidence raises an issue about the victim's being "competent to give informed consent," being unconscious, or being mentally ill, see Wis JI-Criminal 1200C, 1200D, and 1200E, which provide alternatives for these special circumstances.

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The instruction on "without consent" rephrases the statutory definition in the interest of clarifying it for the jury. First, it states the element in the active voice by requiring that the victim did not consent. Second, the Committee concluded that it was more clear to refer to consent as a freely given agreement which may be shown by words or actions rather than to reiterate the statute which refers to consent as "words or overt actions indicating a freely given agreement." No change in meaning is intended. It is more direct to speak of consent as an agreement, evidence of which may be provided by words or actions of the victim, along with the other facts concerning the incident.

If the jury finds that the victim did not in fact consent, it apparently is no defense that the defendant believed there was consent, even if the defendant's belief is reasonable. This is the case because Wis. Stat. § 940.225 uses none of the "intent words" which indicate that the defendant's knowledge of no consent is an element of the crime, see Wis. Stat. § 939.23.

3. See State v. Lederer, 99 Wis.2d 430, 299 N.W.2d 457 (Ct. App. 1980); State v. Clark, 89 Wis.2d 804, 275 N.W.2d 715 (1979).

4. The use of the aiding and abetting concept in § 940.225(1)(c) is somewhat different from that of traditional criminal statutes, because this statute provides for increased penalty for the principal actor where he is aided by others. The usual situation, for example, Wis. Stat. § 939.05(2)(b), Parties to Crime, involves defining the culpability of the aider and abettor. For further definition of "aiding and abetting," see Wis JI-Criminal 400 and the 1953 Judiciary Committee Report on the Criminal Code, Comment to § 339.05.

The requirement that the aider(s) must have known that the defendant was committing the sexual assault is added to the instruction on the basis of the definition of the aider's culpability in § 939.05. Section 939.05 refers to "intentionally aid and abets," which has been interpreted as "acting with knowledge or belief that another person is committing or intends to commit a crime." The Committee also concluded that the defendant must know of the aider's presence or willingness to assist.

Another question arising under this subsection relates to the liability of the aider. Is the aider guilty of second or third degree sexual assault? If aiding is established, the principal is guilty of the second degree offense. Usually, the aider is guilty of the same offense as the principal. In the sexual assault case, however, the crime the aider intended to aid was arguably a third degree offense, Sexual Intercourse Without Consent under § 940.225(3). The aiding is the only factor that elevates the offense as far as the principal is concerned. Does it also increase the seriousness for the aider? The Wisconsin Court of Appeals so held in State v. Curbello-Rodriguez, 119 Wis.2d 414, 351 N.W.2d 758 (Ct. App. 1984), with respect to the same situation under § 940.225(1)(c).

5. The sentence in brackets is recommended for use when the evidence raises an issue whether the person actually gave assistance or merely stood by without intending to assist.

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1215 SECOND DEGREE SEXUAL ASSAULT: SEXUAL CONTACT OR INTERCOURSE WITH A PATIENT OR RESIDENT — § 940.225(2)(g)

Statutory Definition of the Crime

Second degree sexual assault, as defined in § 940.225(2)(g) of the Criminal Code of Wisconsin, is committed by one who is an employee of a (type of facility or program)[1] and has sexual [contact] [intercourse] with a (patient) (resident) of that (facility) (program).

State's Burden of Proof

Before you may find the defendant guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following four elements were present.

Elements of the Crime That the State Must Prove

1. The defendant was an employee of (name of facility or program).[2]
2. (Name of victim) was a (patient)[3] (resident)[4] of (name of facility or program).[5]
3. (Name of facility or program) was [an adult family home] [a community based residential facility] [an inpatient health care facility] [a state treatment facility].[6]

   (Name alternative selected) is (specify the part of the statutory definition that applies).[7]
4. The defendant had sexual [contact] [intercourse] with (name of victim).

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Meaning of ["Sexual Contact"] ["Sexual Intercourse"]

REFER TO WIS JI-CRIMINAL 1200A FOR DEFINITION OF "SEXUAL CONTACT" AND WIS JI-CRIMINAL 1200B FOR DEFINITION OF "SEXUAL INTERCOURSE" AND INSERT THE APPROPRIATE DEFINITION HERE.

Consent to sexual [contact] [intercourse] is not a defense.[8]

Jury's Decision

If you are satisfied beyond a reasonable doubt that all four elements of second degree sexual assault have been proved, you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.

COMMENT

This instruction was originally published in 1988 as Wis JI-Criminal 1217.3 [for sexual intercourse offenses] and Wis JI-Criminal 1217.4 [for sexual contact offenses]. Those instructions were revised in 1990 and 1994. A revision combining the instructions as Wis JI-Criminal 1215 was published in 1996 and revised in 2002. This revision was approved by the Committee in February 2007.

The revised instruction provides for inserting definitions of "sexual contact" and "sexual intercourse" provided in Wis JI-Criminal 1200A and 1200B. That definitional material was formerly included in the text of each offense instruction. When a new alternative was added to the statutory definition of sexual contact by 1995 Wisconsin Act 69, the Committee decided to modify its original approach by providing separate instructions for the definitions. The Committee believes that this will be more convenient to the users of the instructions, making it easier to prepare an instruction that is tailored to the facts of the case.

This instruction is for violations of § 940.225(2)(g), as amended by 1993 Wisconsin Act 445, effective date: May 12, 1994.

1. Section 940.225(2)(g) was amended by 1993 Wisconsin Act 445. The former statute applied to an employee of "an inpatient facility or a state treatment facility." The revised statutes applies to an employee of "a facility or program under s. 940.295(2)(b), (c), (h) or (k)." Those facilities or programs are:

- (2)(b) an adult family home
- (2)(c) a community-based residential facility
- (2)(h) an inpatient health care facility
- (2)(k) a state treatment facility

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The Committee recommends naming the type of facility in this paragraph, for example: " . . .an employee of a state treatment facility."

2. Here insert the name of the facility or program. For example: "St. Mary's Hospital."

3. "Patient" is defined as follows in § 940.225(5)(am):

"Patient" means any person who does any of the following:

1. Receives care or treatment from a facility or program under s. 940.295(2)(b), (c), (h) or (k), from an employe of a facility or program or from a person providing services under contract with a facility or program.

2. Arrives at a facility or program under s. 940.295(2)(b), (c), (h) or (k) for the purpose of receiving care or treatment from a facility or program under s. 940.295(2)(b), (c), (h) or (k), from an employe of a facility or program under s. 940.295(2)(b), (c), (h) or (k), or from a person providing services under a contract with a facility or program under s. 940.295(2)(b), (c), (h) or (k).

4. "Resident" is defined as follows in § 940.225(ar): ". . . any person who resides in a facility under s. 940.295(2)(b), (c), (h), or (k)."

5. Here insert the name of the facility or program. For example: "St. Mary's Hospital."

6. Here insert the name of the facility or program and select the applicable type of facility or program. For example: "St. Mary's Hospital was an inpatient health care facility."

7. Here name the applicable type of facility or program and select the relevant part of the statutory definition for that type of facility or program. For example: "An inpatient health care facility is any hospital licensed or approved by the Department of Health and Family Services under (specify licensing statute)."

Section 940.225(2)(g) applies to offenses involving employees and patients or residents in facilities or programs "under s. 940.295(2)(b), (c), (h), or (k)." Those subsections of § 940.295 refer to definitions in other statutes, resulting in extensive and complex references. The Committee recommends that care be taken to assure that essential parts of the applicable definitions are included.

The facilities or programs under s. 940.295(2)(b), (c), (h), or (k) and the cross-referenced definitions are as follows:

- (2)(b) adult family home. § 940.295(1)(am) provides that "'adult family home' has the meaning given in s. 50.01(1)."

- (2)(c) community-based residential facility. § 940.295(1)(c) provides that "'community-based residential facility' has the meaning given in s. 50.01(1g)."

- (2)(h) inpatient health care facility. § 940.295(1)(i) provides that "'inpatient health care facility' has the meaning given in s. 50.135(1)."

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• (2)(k) state treatment facility. § 940.295(1)(r) provides that "'state treatment facility' has the meaning given in s. 50.01(15)."

Many of the cross-referenced definitions include their own references to other statutes, sometimes to indicate exceptions. The potential for complexity is illustrated by State v. Powers, 2004 WI App 156, ¶6, 276 Wis.2d 107, 687 N.W.2d 50, where the court of appeals held that an employee of a health care facility operated by the United States Department of Veterans Affairs [the VA Medical Center at Tomah] is not subject to prosecution for an alleged violation of § 940.225(2)(g). As applicable to this situation, sub. (2)(g) requires that the victim of the offense be a patient or resident of a facility or program under § 940.295(2)(h) — an inpatient health care facility. Section 940.295(1)(i) provides that "'inpatient health care facility' has the meaning given in s. 50.135(1)." Section 50.135(1) requires that this type of facility be licensed by the state. The state conceded that as a VA facility, the Tomah Medical Center is not licensed by the state, so the court held that § 940.225(2)(g) does not apply.

While Powers was an appeal of the denial of a pretrial motion, the Committee concluded that the state must prove that the facility or program involved in the case is covered by one of the referenced definitions. If not agreed to by the parties, this will present a factual issue for the jury.

8. Section 940.225(4) provides in part: "Consent is not an issue in alleged violations of sub. (2)(c), (d) and (g)."

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1216 SECOND DEGREE SEXUAL ASSAULT: SEXUAL CONTACT OR INTERCOURSE BY A CORRECTIONAL STAFF MEMBER — § 940.225(2)(h)

Statutory Definition of the Crime

Second degree sexual assault, as defined in § 940.225(2)(h) of the Criminal Code of Wisconsin, is committed by a correctional staff member who has sexual [contact] [intercourse] with an individual who is confined in a correctional institution.

State's Burden of Proof

Before you may find the defendant guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following three elements were present.

Elements of the Crime That the State Must Prove

1. The defendant was a correctional staff member.

   "Correctional staff member" means an individual who works at a correctional institution [and includes a volunteer].[1]

2. The defendant had sexual [contact] [intercourse] with (name of victim).[2]

   Consent to sexual [contact] [intercourse] is not a defense.[3]

3. (Name of victim) was confined in a correctional institution.

   (Name institution) is a correctional institution.[4]

Meaning of ["Sexual Contact"] ["Sexual Intercourse"]

REFER TO WIS JI-CRIMINAL 1200A FOR DEFINITION OF "SEXUAL CONTACT" AND WIS JI-CRIMINAL 1200B FOR DEFINITION OF "SEXUAL INTERCOURSE" AND INSERT THE APPROPRIATE DEFINITION HERE.

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Jury's Decision

If you are satisfied beyond a reasonable doubt that all three elements of second degree sexual assault have been proved, you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.

COMMENT

Wis JI-Criminal 1216 was originally published in 2004 and revised in 2007. This revision was approved by the Committee in October 2012; it updated footnotes 1 and 2.

This instruction is drafted for violations of § 940.225(2)(h), created by 2003 Wisconsin Act 51, effective date: September 5, 2003.

1. This is the definition provided in § 940.225(5)(ad). The Committee recommends including the bracketed reference to a volunteer only when there is evidence that the defendant was a volunteer.

A Milwaukee County sheriff's deputy, assigned to work as a bailiff in the courthouse, is not a "correctional staff member" for purposes of § 940.225(2)(h), even though the deputy's duties included escorting inmates from the criminal justice facility to the courthouse holding cell. State v. Terrell, 2006 WI App 166, 295 Wis.2d 619, 721 N.W.2d 527.

2. The definition of the offense in § 940.225(2)(h) includes the following statement:

> This paragraph does not apply if the individual with whom the actor has sexual contact or sexual intercourse is subject to prosecution for the sexual contact or sexual intercourse under this section.

It is not clear to the Committee whether this statement presents an issue for the court or for the jury. In addition, it is not clear what "subject to prosecution" means. The legislative history indicates that this language was added to the original bill in response to concerns of the Attorney General that "the bill as [originally] drafted would make a crime any incident in which a correctional officer is a victim of a sexual assault." Letter of February 26, 2003, from Attorney General Lautenschlager to Reps. Bies and Albers, Co-Chairpersons, Assembly Committee on Corrections and the Courts. (Emphasis in original.)

In State v. Blum, an unpublished decision (No. 2010AP2363-CR, decided August 1, 2012), the court of appeals concluded that the "subject to prosecution" issue is a question of law for the court, not an affirmative defense that should be determined by the fact finder at trial. [Cited for informational purposes; see § 809.23(3)(b).]

3. "Without consent" is not an element of this offense because it is not included in the offense definition. Further, § 940.225(4) provides in part: "Consent is not an issue in alleged violations of sub. (2)(c), (cm), (d), (g),(h), and (i)." The Committee concluded that it may be helpful to advise the jury of this fact.

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4. Section 940.225(5)(acm) provides:

> "Correctional institution" means a jail or correctional facility, as defined in s. 961.01(12m), a juvenile correctional facility, as defined in s. 938.02(10p), or a juvenile detention facility, as defined in s. 938.02(10r).

By following these cross references, one may find a statute that provides that a particular institution or facility is a correctional institution. See, for example, the list of "state prisons" in § 302.01. When a statute so provides, the Committee recommends advising the jury that, for example, "The Waupun Correctional Institution is a correctional institution." It will be for the jury to determine whether, in fact, the victim was confined to that institution.

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1217 SECOND DEGREE SEXUAL ASSAULT: SEXUAL CONTACT OR INTERCOURSE BY A PROBATION, PAROLE, OR EXTENDED SUPERVISION AGENT — § 940.225(2)(i)

Statutory Definition of the Crime

Second degree sexual assault, as defined in § 940.225(2)(i) of the Criminal Code of Wisconsin, is committed by a [probation] [parole] [extended supervision] agent who has sexual [contact] [intercourse] with an individual on [probation] [parole] [extended supervision], and who supervises that individual in his or her capacity as an agent.

State's Burden of Proof

Before you may find the defendant guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following four elements were present.

Elements of the Crime That the State Must Prove

1. The defendant was a [probation] [parole] [extended supervision] agent.[1]

2. The defendant had sexual [contact] [intercourse] with (name of victim).[2]

   Consent to sexual [contact] [intercourse] is not a defense.[3]

3. (Name of victim) was on [probation] [parole] [extended supervision].

4. The defendant supervised (name of victim) in [his] [her] capacity as a [probation] [parole] [extended supervision] agent.[4]

Meaning of ["Sexual Contact"] ["Sexual Intercourse"]

REFER TO WIS JI-CRIMINAL 1200A FOR DEFINITION OF "SEXUAL CONTACT" AND WIS JI-CRIMINAL 1200B FOR DEFINITION OF "SEXUAL INTERCOURSE" AND INSERT THE APPROPRIATE DEFINITION HERE.

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Jury's Decision

If you are satisfied beyond a reasonable doubt that all four elements of second degree sexual assault have been proved, you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.

COMMENT

Wis JI-Criminal 1217 was originally published in 2004 and revised in 2007. This revision was approved by the Committee in October 2012; it updated footnote 2.

This instruction is drafted for violations of § 940.225(2)(i), created by 2003 Wisconsin Act 51, effective date: September 5, 2003.

The instruction uses a simplified statement of the statutory description of the supervision requirement in sub. (2)(i), which reads in part as follows:

> . . . agent who supervises the individual, either directly or through a subordinate, . . . or who has influenced or has attempted to influence another probation, parole, or extended supervision agent's supervision of the individual.

If a case involves supervising "through a subordinate" or "influencing or attempting to influence" another agent's supervision, the introductory definition of the offense and the fourth element must be modified.

1. The statute does not provide a definition of "probation, parole or extended supervision agent." However, another Criminal Code statute, § 940.20(2m)(a)2. provides the following:

> "Probation, extended supervision and parole agent" means any person authorized by the department of corrections to exercise control over a probationer, parolee or person on extended supervision.

2. The definition of the offense in § 940.225(2)(i) includes the following statement:

> This paragraph does not apply if the individual with whom the actor has sexual contact or sexual intercourse is subject to prosecution for the sexual contact or sexual intercourse under this section.

It is not clear to the Committee whether this statement presents an issue for the court or for the jury. In addition, it is not clear what "subject to prosecution" means. The legislative history indicates that this language was added to the original bill in response to concerns of the Attorney General that "the bill as [originally] drafted would make a crime any incident in which a correctional officer is a victim of a sexual assault." Letter of February 26, 2003, from Attorney General Lautenschlager to Reps. Bies and Albers, Co-Chairpersons, Assembly Committee on Corrections and the Courts. (Emphasis in original.)

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In State v. Blum, an unpublished decision (No. 2010AP2363-CR, decided August 1, 2012), the court of appeals concluded that the "subject to prosecution" issue is a question of law for the court, not an affirmative defense that should be determined by the fact finder at trial. [Cited for informational purposes; see § 809.23(3)(b).] Blum involved a prosecution under § 940.225(2)(h), which has the same statement relating to "subject to prosecution."

3. "Without consent" is not an element of this offense because it is not included in the offense definition. Further, § 940.225(4) provides in part: "Consent is not an issue in alleged violations of sub. (2)(c), (cm), (d), (g),(h), and (i)." The Committee concluded that it may be helpful to advise the jury of this fact.

4. This is a simplified statement of the statutory description of the supervision requirement in sub. (2)(i), which reads in part as follows:

> . . . agent who supervises the individual, either directly or through a subordinate, . . . or who has influenced or has attempted to influence another probation, parole, or extended supervision agent's supervision of the individual.

The fourth element must be modified if the case involves supervision "through a subordinate" or "influencing or attempting to influence" another agent's supervision.

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1217A SECOND DEGREE SEXUAL ASSAULT: SEXUAL CONTACT OR INTERCOURSE BY AN EMPLOYEE OF AN ENTITY — § 940.225(2)(j)

Statutory Definition of the Crime

Second degree sexual assault, as defined in § 940.225(2)(j) of the Criminal Code of Wisconsin, is committed by a licensee, employee, or nonclient resident of an entity who has sexual [contact] [intercourse] with a client of the entity.

State's Burden of Proof

Before you may find the defendant guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following three elements were present.

Elements of the Crime That the State Must Prove

1. The defendant was a (licensee) (employee) (nonclient resident)[1] of an entity.

2. The defendant had sexual [contact] [intercourse] with (name of victim).

   Consent to sexual [contact] [intercourse] is not a defense.[2]

3. (Name of victim) was a client of the entity.

   "Client" means an individual who receives direct care or treatment services from an entity.[3]

Meaning of "Entity"

"Entity" means _____.[4]

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Meaning of ["Sexual Contact"] ["Sexual Intercourse"]

REFER TO WIS JI-CRIMINAL 1200A FOR DEFINITION OF "SEXUAL CONTACT" AND WIS JI-CRIMINAL 1200B FOR DEFINITION OF "SEXUAL INTERCOURSE" AND INSERT THE APPROPRIATE DEFINITION HERE.

Jury's Decision

If you are satisfied beyond a reasonable doubt that all three elements of second degree sexual assault have been proved, you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.

COMMENT

Wis JI-Criminal 1217A was approved by the Committee in August 2006.

Section 940.225(2)(j) was created by 1997 Wisconsin Act 388 (effective date: Dec. 1, 2006).

The instruction provides for inserting definitions of "sexual contact" and "sexual intercourse" provided in Wis JI-Criminal 1200A and 1200B. That definitional material was formerly included in the text of each offense instruction. When a new alternative was added to the statutory definition of sexual contact by 1995 Wisconsin Act 69, the Committee decided to modify its original approach by providing separate instructions for the definitions. The Committee believes that this will be more convenient to the users of the instructions, making it easier to prepare an instruction that is tailored to the facts of the case.

1. Section 940.225(5)(ak), created by 2005 Wisconsin Act 388, defines "nonclient resident" as follows: "... an individual who resides, or is expected to reside, at an entity, who is not a client of the entity, and who has, or is expected to have, regular, direct contact with the clients of the entity."

2. "Without consent" is not an element of this offense because it is not included in the offense definition. The Committee concluded that it may be helpful to advise the jury of this fact.

3. This is the definition provided in s. 940.225(5)(abm), which was created by 2005 Wisconsin Act 388.

4. Section 940.225(2)(j) refers to "an entity, as defined in s. 48.685(1)(b) or 50.065(1)(c). The Committee recommends choosing the applicable part of applicable definition and inserting it in the blank.

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1218A THIRD DEGREE SEXUAL ASSAULT: SEXUAL INTERCOURSE WITHOUT CONSENT — § 940.225(3)(a)

Statutory Definition of the Crime

Third degree sexual assault, as defined in § 940.225(3)(a) of the Criminal Code of Wisconsin, is committed by one who has sexual intercourse with another person without consent.

State's Burden of Proof

Before you may find the defendant guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following two elements were present.

Elements of the Crime That the State Must Prove

1. The defendant had sexual intercourse with (name of victim).
2. (Name of victim) did not consent to the sexual intercourse.

Meaning of "Sexual Intercourse"

"Sexual intercourse" means any intrusion, however slight, of any part of a person's body or of any object, into the genital or anal opening of another. Emission of semen is not required.[1]

Meaning of "Did Not Consent"[2]

"Did not consent" means that (name of victim) did not freely agree to have sexual intercourse with the defendant. In deciding whether (name of victim) did not consent, you

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should consider what [he] [she] said and did, along with all the other facts and circumstances. This element does not require that (name of victim) offered physical resistance.[3]

Jury's Decision

If you are satisfied beyond a reasonable doubt that both elements of third degree sexual assault have been proved, you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.

COMMENT

This instruction was originally published in 1980 as Wis ll-Criminal 1218 and revised in 1983 and 1990. A revision renumbering it as Wis JI-Criminal 1218A was published in 1996. A revision in 2001 involved adoption of a new format and nonsubstantive changes to the text. This revision was approved by the Committee in June 2018; it reflects changes made by 2017 Wisconsin Act 174 [effective date: March 30, 2018].

This instruction is for violations of § 940.225(3)(a): sexual intercourse without consent, as amended by 2017 Wisconsin Act 174. Act 174 amended former sub.(3) by splitting it into subdivs. (a) and (b). The text and the penalty were not changed.

See Wis JI-Criminal 1218B for violations under sub. (3)(b): sexual contact [as defined in § 940.225(5)(b)2. and 3.] without consent.

1. The alternatives for defining "sexual intercourse" are those found in Wis JI-Criminal 1200B. They are built in to this instruction for the convenience of users and to emphasize that this instruction is for third degree sexual assaults involving sexual intercourse, not third degree sexual assaults involving the new type of sexual contact created by 1995 Wisconsin Act 69. The definition of "sexual intercourse" is explained in the Comment to Wis JI-Criminal 1200R.

2. The definition of "consent," found in Wis. Stat. § 940.225(4), applies to prosecutions under § 940.225. The definition of "without consent," found in § 939.22(48), is applicable to other Criminal Code Offenses but does not apply to prosecutions under § 940.225. Section 940.225(4) reads as follows:

> "Consent," as used in this section, means words or overt actions by a person who is competent to give informed consent indicating a freely given agreement to have sexual intercourse or sexual contact. Consent is not an issue in alleged violations of subs. (2)(c), (d) and (g). The following persons are presumed incapable of consent but the presumption may be rebutted by competent evidence, subject to the provisions of § 972.11(2):

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(b) A person suffering from a mental illness or defect which impairs capacity to appraise personal conduct.
(c) A person who is unconscious or for any other reason is physically unable to communicate unwillingness to an act.

The definition of "without consent" used in the instruction is designed for the usual case where no special circumstances recognized by the statute as affecting consent are present. If the evidence raises an issue about the victim's being "competent to give informed consent," being unconscious, or being mentally ill, see Wis JI-Criminal 1200C, 1200D, and 1200E, which provide alternatives for these special circumstances.

The instruction on "without consent" rephrases the statutory definition in the interest of clarifying it for the jury. First, it states the element in the active voice by requiring that the victim did not consent. Second, the Committee concluded that it was more clear to refer to consent as a. freely given agreement which may be shown by words or actions rather than to reiterate the statute which refers to consent as "words or overt actions indicating a freely given agreement." No change in meaning is intended. It is more direct to speak of consent as an agreement, evidence of which may be provided by words or actions of the victim, along with the other facts concerning the incident.

If the jury finds that the victim did not in fact consent, it apparently is no defense that the defendant believed there was consent, even if the defendant's belief is reasonable. This is the case because Wis. Stat. § 940.225 uses none of the "intent words" which indicate that the defendant's knowledge of no consent is an element of the crime, see Wis. Stat. § 939.23.

3. See State v. Lederer, 99 Wis.2d 430, 299 N.W.2d 457 (Ct. App. 1980); State v. Clark, 89 Wis.2d 804, 275 N.W.2d 715 (1979).

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1218B THIRD DEGREE SEXUAL ASSAULT: SEXUAL CONTACT WITHOUT CONSENT INVOLVING EJACULATION, ETC. — § 940.225(3)(b)

Statutory Definition of the Crime

Third degree sexual assault, as defined in § 940.225(3)(b) of the Criminal Code of Wisconsin, is committed by one who has sexual contact with another person without consent.

State's Burden of Proof

Before you may find the defendant guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following two elements were present.

Elements of the Crime That the State Must Prove

1. The defendant had sexual contact with (name of victim).
2. (Name of victim) did not consent to the sexual contact.

Meaning of "Sexual Contact"

Sexual contact requires

[intentional [penile ejaculation of ejaculate] [emission of (urine) (feces)] by the defendant upon any part of the body clothed or unclothed of (name of victim).][1]

[that the defendant intentionally caused (name of victim) to [ejaculate] [emit (urine) (feces)] on any part of the defendant's body, whether clothed or unclothed.][2]

Sexual contact also requires that the defendant acted with intent to [become sexually aroused or gratified] [sexually degrade or humiliate (name of victim)].[3]

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Deciding About Intent

You cannot look into a person's mind to find intent. Intent must be found, if found at all, from the defendant's acts, words, and statements, if any, and from all the facts and circumstances bearing upon intent.

Meaning of "Did Not Consent"[4]

"Did not consent" means that (name of victim) did not freely agree to have sexual contact with the defendant. In deciding whether (name of victim) did not consent, you should consider what [he] [she] said and did, along with all the other facts and circumstances. This element does not require that (name of victim) offered physical resistance.[5]

Jury's Decision

If you are satisfied beyond a reasonable doubt that both elements of third degree sexual assault have been proved, you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.

COMMENT

Wis JI-Criminal 1218B was originally published in 1996 and revised in 2002 and 2004. The 2004 revision involved a correction of an inadvertent error in the definition of consent. This revision was approved by the Committee in June 2018; it reflects changes made by 2017 Wisconsin Act 174 [effective date: March 30, 2018].

This instruction is for violations of § 940.225(3)(b), as amended by 2017 Wisconsin Act 174. For violations of sub. (3)(a), see Wis JI-Criminal 1218A. Act 174 amended former sub. (3) by splitting it into two subdivs. (a) and (b). The text and the penalty were not changed. This instruction applies only to sexual contact as defined in § 940.225(5)(b)2. and 3. which provide that sexual contact includes:

> Sub. (b)2. Intentional penile ejaculation of ejaculate or intentional emission of urine or feces by the defendant upon any part of the body clothed or unclothed of the complainant if that

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ejaculation or emission is either for the purpose of sexually degrading or sexually humiliating the complainant or for the purpose of sexually arousing or gratifying the defendant.

Sub. (b)3. For the purpose of sexually degrading or humiliating the complainant or sexually arousing or gratifying the defendant, intentionally causing the complainant to ejaculate or emit urine or feces on any part of the defendant's body, whether clothed or unclothed.

2017 Wisconsin Act 174 amended former sub. (3) by splitting it into subivs. (a) and (b). The text and the penalty were not changed. See Wis JI-Criminal 1218A for violations under sub. (3)(a): sexual intercourse without consent.

Unlike the other instructions for sexual contact offenses, this instruction builds in the applicable alternative specified in subs. (5)(b) 2. and 3. This is to emphasize that this instruction is only for those specific types of sexual contact. For sexual contact offense generally, see Wis JI-Criminal 1219.

1. This definition of "sexual contact" was created by 1995 Wisconsin Act 69 [effective date: December 2, 2095], which also created the offense addressed by this instruction.

2. The instruction phrases the alternatives as requiring that the defendant acted "with intent to" achieve one of the prohibited results. The statute refers to acting with "the purpose of ..." No change in meaning is intended.

Note that only the two identified alternatives apply to sexual contact involving intentional ejaculation or intentional emission of urine or feces. The "intent to cause bodily harm" alternative that applies to other types of sexual contact does not apply to the offense defined by this instruction. See Wis JI-Criminal 1200A.

3. This definition of "sexual contact" was created by 2005 Wisconsin Act 273 [effective date: April 20, 2006.]

4. The definition of "consent," found in Wis. Stat. § 940.225(4), applies to prosecutions under § 940.225. The definition of "without consent," found in § 939.22(48), is applicable to other Criminal Code Offenses but does not apply to prosecutions under § 940.225. Section 940.225(4) reads as follows:

"Consent," as used in this section, means words or overt actions by a person who is competent to give informed consent indicating a freely given agreement to have sexual intercourse or sexual contact. Consent is not an issue in alleged violations of subs. (2)(c), (d) and (g). The following persons are presumed incapable of consent but the presumption may be rebutted by competent evidence, subject to the provisions of § 972.11(2):

(b) A person suffering from a mental illness or defect which impairs capacity to appraise personal conduct.

(c) A person who is unconscious or for any other reason is physically unable to communicate unwillingness to an act.

The definition of "without consent" used in the instruction is designed for the usual case where no special circumstances recognized by the statute as affecting consent are present. If the evidence raises an

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issue about the victim's being "competent to give informed consent," being unconscious, or being mentally ill, see Wis JI-Criminal 1200C, 1200D, and 1200E, which provide alternatives for these special circumstances.

The instruction on "without consent" rephrases the statutory definition in the interest of clarifying it for the jury. First, it states the element in the active voice by requiring that the victim did not consent. Second, the Committee concluded that it was more clear to refer to consent as a freely given agreement which may be shown by words or actions rather than to reiterate the statute which refers to consent as "words or overt actions indicating a freely given agreement." No change in meaning is intended. It is more direct to speak of consent as an agreement, evidence of which may be provided by words or actions of the victim, along with the other facts concerning the incident.

If the jury finds that the victim did not in fact consent, it apparently is no defense that the defendant believed there was consent, even if the defendant's belief is reasonable. This is the case because Wis. Stat. § 940.225 uses none of the "intent words" which indicate that the defendant's knowledge of no consent is an element of the crime, see Wis. Stat.§ 939.23.

5. See State v. Lederer, 99 Wis.2d 430,299 N.W.2d 457 (Ct. App. 1980); State v. Clark, 89 Wis.2d 804,275 N.W.2d 715 (1979).

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1219 FOURTH DEGREE SEXUAL ASSAULT: SEXUAL CONTACT WITHOUT CONSENT — § 940.225(3m)

Statutory Definition of the Crime

Fourth degree sexual assault, as defined in § 940.225(3m) of the Criminal Code of Wisconsin, is committed by one who has sexual contact with another person without consent.

State's Burden of Proof

Before you may find the defendant guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following two elements were present.

Elements of the Crime That the State Must Prove

1. The defendant had sexual contact with (name of victim).
2. (Name of victim) did not consent to the sexual contact.

Meaning of "Sexual Contact"

FOR SEXUAL CONTACT INVOLVING THE DEFENDANT TOUCHING THE VICTIM:

[Sexual contact is an intentional touching by the defendant of the (name intimate part)[1] of (name of victim). The touching may be of the (name intimate part) directly or it may be through the clothing. The touching may be done by any body part or by any object, but it must be an intentional touching.

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Sexual contact also requires that the defendant acted with intent to (cause bodily harm to (name of victim).) (become sexually aroused or gratified.) (sexually degrade or humiliate (name of victim).)[2]]

FOR SEXUAL CONTACT INVOLVING THE VICTIM BEING CAUSED OR ALLOWED TO TOUCH THE DEFENDANT:

[Sexual contact is an intentional touching by (name of victim) of the (name intimate part)[3] of the defendant, if the defendant intentionally caused[4] (name of victim) to do that touching. The touching may be of the (name intimate part) directly or it may be through the clothing.

Sexual contact also requires that the defendant acted with intent to (cause bodily harm to (name of victim).) (become sexually aroused or gratified.) (sexually degrade or humiliate (name of victim).)[5]]

Deciding About Intent

You cannot look into a person's mind to find intent. Intent must be found, if found at all, from the defendant's acts, words, and statements, if any, and from all the facts and circumstances bearing upon intent.

Meaning of "Did Not Consent"[6]

"Did not consent" means that (name of victim) did not freely agree to have sexual contact with the defendant. In deciding whether (name of victim) did not consent, you should consider what she said and did, along with all the other facts and circumstances. This element does not require that (name of victim) offered physical resistance.[7]

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Jury's Decision

If you are satisfied beyond a reasonable doubt that both elements of fourth degree sexual assault have been proved, you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.

COMMENT

Wis JI-Criminal 1219 was originally published in 1980 and revised in 1983, 1990, 1992, 1996, and 2002. This revision was approved by the Committee in February 2004 and involved correction of an inadvertent error in the consent definition.

This instruction is for fourth degree sexual assault as defined in § 940.225(3m). It applies to cases involving "sexual contact" as defined in § 940.225(5)(b)1. A new type of third degree sexual assault was created by 1995 Wisconsin Act 69, effective date: December 2, 1995. It applies only to sexual contact as defined in § 940.225(5)(b)2., which provides that sexual contact includes:

> Intentional penile ejaculation of ejaculate or intentional emission of urine or feces by the defendant upon any part of the body clothed or unclothed of the complainant if that ejaculation or emission is either for the purpose of sexually degrading or sexually humiliating the complainant or for the purpose of sexually arousing or gratifying the defendant.

See Wis JI-Criminal 1218B for an instruction for third degree sexual assault based on the new definition of "sexual contact."

Unlike the other instructions for sexual contact offenses, this instruction builds in the alternatives for defining "sexual contact" that are found in Wis JI-Criminal 1200A. This was done for the convenience of users and to emphasize that the definition of a new type of sexual contact created by 1995 Wisconsin Act 69 [see above] does not apply to fourth degree sexual assault as defined in § 940.225(3m).

1. Section 939.22(19) defines "intimate parts": "'Intimate parts' means the breast, buttock, anus, groin, scrotum, penis, vagina, or pubic mound of a human being." The Committee suggests naming the specific intimate part involved in the sexual contact.

In State v. Morse, 126 Wis.2d 1, 374 N.W.2d 388 (Ct, App. 1985), the court of appeals held that a trial court did not improperly broaden the scope of the sexual contact definition in § 939.22(19) by defining "intimate part" to include "the vaginal area."

2. Each alternative definition includes the requirement that the contact be for a prohibited purpose. Earlier versions of the instructions included the purpose as a separate element, but the Committee concluded that it was preferable to deal with at as a second part of the sexual contact definition. The Committee also concluded that including purpose as part of each alternative will reduce the possibility that it would be inadvertently overlooked. Failure to include the purpose of the contact as a part of the jury instruction is

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reversible error. State v. Krueger, 2001 WI App 14, 240 Wis.2d 644, 623 N.W.2d 211. Likewise, failure to include reference to purpose when accepting a guilty plea may be grounds for withdrawal of the plea. State v. Bollig, 2000 WI 6, 232 Wis.2d 561, 605 N.W.2d 199.

The instruction phrases the alternatives as requiring that the defendant acted "with intent to" achieve one of the prohibited results. The statute refers to acting with "the purpose of . . ." No change in meaning is intended.

3. See note 1, supra.

4. The instruction refers to the touching of the defendant by the complainant as a touching which the defendant "causes" the complainant to do. The statute does not expressly provide for the "causing" alternative, but the Committee concluded that the requirement is implicit.

For sexual assault offenses against children, another alternative exists for this type of sexual contact: allowing a child to touch an intimate part of the defendant. This alternative was recognized in State v. Traylor, 170 Wis.2d 393, 489 N.W.2d 626 (Ct. App. 1992). See the discussion in note 5, Wis JI-Criminal 2101A. Under § 940.225, certain adult victims are in a situation very similar to that of a child victim: persons suffering from mental illness or deficiency [sub. (2)(c)]; persons under the influence of an intoxicant [sub. (2)(cm)]; or, patients or residents [sub. (2)(g)]. However, the Committee decided not to incorporate the "or allowed" alternative in this instruction in the absence of clear authority extending the Traylor decision beyond offenses against children.

Applied literally to a case where the victim is caused to touch the defendant, § 940.225(5)(b) requires an "intentional touching by the complainant . . . of the . . . defendants' intimate parts. . . ." The Committee concluded that it is proper to interpret this definition in a manner that focuses on the defendant's, rather than the victim's, intent. Thus, the instruction refers simply to "a touching" by the victim that the defendant "intentionally caused." This is consistent with the Traylor decision's interpretation of almost identical language in the definition of "sexual contact" in § 948.01(5)(a).

The constitutionality of the sexual contact definition (prior to its amendment by Chapter 309, Laws of 1981) was considered by the Wisconsin courts in several cases. The constitutionality of the basic definition was upheld in State ex rel. Skinkis v. Treffert, 90 Wis.2d 528, 280 N.W.2d 316 (Ct. App. 1979). In State v. Nye, 105 Wis.2d 63, 312 N.W.2d 826 (1981), the Wisconsin Supreme Court summarily affirmed a Wisconsin Court of Appeals decision (101 Wis.2d 398, 302 N.W.2d 83 (Ct. App. 1981)) which held that it was error to include in a jury instruction the former statutory language "if that touching can reasonably be construed to be for the purpose of sexual arousal or gratification." Chapter 309, Laws of 1981, eliminated the phrase from § 940.225(5)(b); the standard instructions had never included it in the definition of sexual contact.

5. See note 2, supra.

6. The definition of "consent," found in Wis. Stat. § 940.225(4), applies to prosecutions under § 940.225. The definition of "without consent," found in § 939.22(48), is applicable to other Criminal Code offenses but does not apply to prosecutions under § 940.225. Section 940.225(4) reads as follows:

> "Consent," as used in this section, means words or overt actions by a person who is competent to give informed consent indicating a freely given agreement to have sexual intercourse or sexual

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contact. Consent is not an issue in alleged violations of subs. (2)(c), (d) and (g). The following persons are presumed incapable of consent but the presumption may be rebutted by competent evidence, subject to the provisions of § 972.11(2):

(b) A person suffering from a mental illness or defect which impairs capacity to appraise personal conduct.
(c) A person who is unconscious or for any other reason is physically unable to communicate unwillingness to an act.

The definition of "without consent" used in the instruction is designed for the usual case where no special circumstances recognized by the statute as affecting consent are present. If the evidence raises an issue about the victim's being "competent to give informed consent," being unconscious, or being mentally ill, see Wis JI-Criminal 1200C, 1200D, and 1200E, which provide alternatives for these special circumstances.

The instruction on "without consent" rephrases the statutory definition in the interest of clarifying it for the jury. First, it states the element in the active voice by requiring that the victim did not consent. Second, the Committee concluded that it was more clear to refer to consent as a freely given agreement which may be shown by words or actions rather than to reiterate the statute which refers to consent as "words or overt actions indicating a freely given agreement." No change in meaning is intended. It is more direct to speak of consent as an agreement, evidence of which may be provided by words or actions of the victim, along with the other facts concerning the incident.

If the jury finds that the victim did not in fact consent, it apparently is no defense that the defendant believed there was consent, even if the defendant's belief is reasonable. This is the case because Wis. Stat. § 940.225 uses none of the "intent words" which indicate that the defendant's knowledge of no consent is an element of the crime, see Wis. Stat. § 939.23.

7. See State v. Lederer, 99 Wis.2d 430, 299 N.W.2d 457 (Ct. App. 1980); State v. Clark, 89 Wis.2d 804, 275 N.W.2d 715 (1979).

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1220-1246 BATTERY AND RELATED OFFENSES: INTRODUCTORY COMMENT

[INSTRUCTION WITHDRAWN]

COMMENT

Wis JI-Criminal 1220-1246 Battery and Related Offenses: Introductory Comment, was published in 1994 and withdrawn by the Committee in 2007.

NOTE: Wis JI-Criminal 1220-1246 was an Introductory Comment, describing a change in the numbering of instructions for battery offenses. The instructions themselves, from Wis JI-Criminal 1220 through Wis JI-Criminal 1246, were not withdrawn.

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1220 BATTERY — § 940.19(1)

Statutory Definition of the Crime

Battery, as defined in § 940.19(1) of the Criminal Code of Wisconsin, is committed by one who causes bodily harm to another by an act done with the intent to cause bodily harm to that person or another without the consent of the person so harmed.

State's Burden of Proof

Before you may find the defendant guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following four elements were present.

Elements of the Crime That the State Must Prove

1. The defendant caused bodily harm to (name of victim).

   "Cause" means that the defendant's act was a substantial factor in producing the bodily harm.[1]

   "Bodily harm" means physical pain or injury, illness, or any impairment of physical condition.[2]

2. The defendant intended to cause bodily harm to [(name of victim)] [another person].[3]

   "Intent to cause bodily harm" means that the defendant had the mental purpose to cause bodily harm to another human being or was aware that (his) (her) conduct was practically certain to cause bodily harm to another human being.[4]

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3. The defendant caused bodily harm without the consent[5] of (name of victim).

4. The defendant knew that (name of victim) did not consent.

Deciding About Intent and Knowledge

You cannot look into a person's mind to find intent and knowledge. Intent and knowledge must be found, if found at all, from the defendant's acts, words, and statements, if any, and from all the facts and circumstances in this case bearing upon intent and knowledge.[6]

Jury's Decision

If you are satisfied beyond a reasonable doubt that all four elements of battery have been proved, you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.

COMMENT

Wis JI-Criminal 1220 was originally published in 1966 and revised in 1979, 1980, 1986, 1992, 1994, and 2001. This revision was approved by the Committee in June 2014 and involved a nonsubstantive correction in the text.

This instruction is for "simple battery," as defined in § 940.19(1). For an instruction integrating the privilege of self-defense with simple battery, see Wis JI-Criminal 1220A.

Subsection (2m) of § 939.66 provides that a "crime which is a less serious or equally serious type of battery than the one charged" is a lesser included offense. "Or equally serious" was added by 1993 Wisconsin Act 441, effective date: May 10, 1994. This change clarified the confusion resulting from the drafting of the battery statutes in terms that did not satisfy the strict "comparison of the statutory elements" test that the Wisconsin Supreme Court has adopted for lesser included offenses. See State v. Richards, 123 Wis.2d 1, 365 N.W.2d 7 (1985), where the court held that simple battery under § 940.19(1) and "intermediate battery" under § 940.19(1m) are not lesser included offenses of aggravated battery.

The amendment to § 939.66 affects only the legal possibility of submitting the lesser offense; the evidentiary standard for submitting the lesser crime must also be satisfied. See SM-6, Jury Instructions on Lesser Included Offenses.

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1. The Committee concluded that the simple "substantial factor" definition of cause should be sufficient for most cases. Where there is evidence of more than one possible cause, something like the following might be added:

> There may be more than one cause of bodily harm. The act of one person alone might produce it, or the acts of two or more persons might jointly produce it.

2. This is the definition of "bodily harm" provided in § 939.22(4).

3. In most cases, the defendant will be charged with intending to harm the actual victim and the name of the victim should be used in instructing the jury. However, the defendant is also guilty of battery if he intends to harm one person but actually harms another. This is the common law doctrine of transferred intent which has been described as follows in connection with first degree murder:

> It is immaterial that the human being killed is not the one the actor intended to kill. If X shoots at and kills a person who he thinks is Y but who is actually Z, X is as guilty as if he had not been mistaken about the identity of the person killed. The same is true where X shoots at Y intending to kill him, but he misses Y and kills Z. In both of these cases, X has caused "the death of another human being by an act done with intent to kill that person or another." In other words, the section incorporates the common law doctrine of "transferred intent."

1953 Judiciary Committee Report on the Criminal Code, Wisconsin Legislative Council, page 58.

4. See § 939.23(4) and Wis JI-Criminal 923A and 923B.

5. If definition of "without consent" is believed to be necessary, see Wis JI-Criminal 948 which provides an instruction based on the definition provided in § 939.22(48). That definition provides that "without consent" means "no consent in fact" or that consent was given because of fear, a claim of legal authority by the defendant, or misunderstanding.

6. This is the shorter version used to describe the process of finding intent. The Committee concluded that it is suitable for use in most cases. For the longer description of the intent-finding process, see Wis JI-Criminal 923A.

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1220A BATTERY: SELF-DEFENSE IN ISSUE — § 940.19(1); § 939.48

Statutory Definition of the Crime

Battery, as defined in § 940.19(1) of the Criminal Code of Wisconsin, is committed by one who causes bodily harm to another by an act done with the intent to cause bodily harm to that person or another without the consent of the person so harmed.

State's Burden of Proof

Before you may find the defendant guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following four elements were present.

Elements of the Crime That the State Must Prove

1. The defendant caused bodily harm to (name of victim).

   "Cause" means that the defendant's act was a substantial factor in producing the bodily harm.[1]

   "Bodily harm" means physical pain or injury, illness, or any impairment of physical condition.[2]

2. The defendant intended to cause bodily harm to [(name of victim)] [another person].[3]

   "Intent to cause bodily harm" means that the defendant had the mental purpose to cause bodily harm to another human being or was aware that (his) (her) conduct was practically certain to cause bodily harm to another human being.[4]

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3. The defendant caused bodily harm without the consent[5] of (name of victim).

4. The defendant knew that (name of victim) did not consent.

Deciding About Intent and Knowledge

You cannot look into a person's mind to find intent and knowledge. Intent and knowledge must be found, if found at all, from the defendant's acts, words, and statements, if any, and from all the facts and circumstances in this case bearing upon intent and knowledge.[6]

Self-Defense

Self-defense is an issue in this case. The law of self-defense allows the defendant to threaten or intentionally use force against another only if:[7]

- the defendant believed that there was an actual or imminent unlawful interference with the defendant's person; and
- the defendant believed that the amount of force the defendant used or threatened to use was necessary to prevent or terminate the interference; and
- the defendant's beliefs were reasonable.

Determining Whether Beliefs Were Reasonable

A belief may be reasonable even though mistaken.[8] In determining whether the defendant's beliefs were reasonable, the standard is what a person of ordinary intelligence and prudence would have believed in the defendant's position under the circumstances that existed at the time of the alleged offense.[9] The reasonableness of the defendant's beliefs must

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be determined from the standpoint of the defendant at the time of the defendant's acts and not from the viewpoint of the jury now.

[IF RETREAT IS AN ISSUE, ADD APPROPRIATE INSTRUCTION HERE — SEE WIS JI-CRIMINAL 810.]

[IF THERE IS EVIDENCE THAT THE DEFENDANT PROVOKED THE ATTACK, ADD APPROPRIATE INSTRUCTION HERE — SEE WIS JI-CRIMINAL 815.]

State's Burden of Proof

The State must prove by evidence which satisfies you beyond a reasonable doubt that the defendant did not act lawfully in self-defense.

Jury's Decision

If you are satisfied beyond a reasonable doubt that all four elements of battery have been proved and that the defendant did not act lawfully in self-defense, you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.

COMMENT

Wis JI-Criminal 1220A was originally published in 1985 and revised in 1994 and 2001. This revision was approved by the Committee in June 2014 and involved a nonsubstantive correction in the text.

This instruction combines the uniform instruction for simple battery (Wis JI-Criminal 1220) with the instruction on the privilege of self-defense (Wis JI-Criminal 800). The Committee concluded that integrating the elements and the privilege provides a clearer statement of all the facts necessary to constitute guilt in a case where self-defense is an issue. This kind of approach was suggested in State v. Staples, 99 Wis.2d 364, 299 N.W.2d 270 (Ct. App. 1980).

1. If a more extensive definition of "cause" is necessary, see Wis JI-Criminal 901.

2. This is the definition of "bodily harm" provided in § 939.22(4).

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3. In most cases, the defendant will be charged with intending to harm the actual victim and the name of the victim should be used in instructing the jury. However, the defendant is also guilty of battery if he intends to harm one person but actually harms another. This is the common law doctrine of transferred intent which has been described as follows in connection with first degree murder:

> It is immaterial that the human being killed is not the one the actor intended to kill. If X shoots at and kills a person who he thinks is Y but who is actually Z, X is as guilty as if he had not been mistaken about the identity of the person killed. The same is true where X shoots at Y intending to kill him, but he misses Y and kills Z. In both of these cases, X has caused "the death of another human being by an act done with intent to kill that person or another." In other words, the section incorporates the common law doctrine of "transferred intent."

1953 Judiciary Committee Report on the Criminal Code, Wisconsin Legislative Council, page 58.

4. See § 939.23(4) and Wis JI-Criminal 923A and 923B.

5. If definition of "without consent" is believed to be necessary, see Wis JI-Criminal 948 which provides an instruction based on the definition provided in § 939.22(48). That definition provides that "without consent" means "no consent in fact" or that consent was given because of fear, a claim of legal authority by the defendant, or misunderstanding.

6. This is the shorter version used to describe the process of finding intent. The Committee concluded that it is suitable for use in most cases. For the longer description of the intent-finding process, see Wis JI-Criminal 923A.

7. The instruction on self-defense is adapted from Wis JI-Criminal 800.

8. This treatment of "reasonably believes" is intended to be consistent with the definition provided in § 939.22(32).

9. The phrase "in the defendant's position under the circumstances that existed at the time of the alleged offense" is intended to allow consideration of a broad range of circumstances that relate to the defendant's situation. For example, with children (assuming they are old enough to be criminally charged), the standard relates to a reasonable person of like age, intelligence, and experience. Maichle v. Jonovic, 69 Wis.2d 622, 627-28, 230 N.W.2d 789 (1975).

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1221 ABUSE OF CHILDREN

1221A ABUSE OF CHILDREN — EXPOSING A CHILD TO CRUEL MALTREATMENT — § 940.201

[INSTRUCTIONS WITHDRAWN]

COMMENT

Wis JI-Criminal 1221 was originally published in 1974 and was revised in 1978, 1981, and 1986.

Wis JI-Criminal 1221A was originally published in 1987.

Both instructions were withdrawn in 1989 because the statute with which they deal was repealed by 1987 Wisconsin Act 332, effective July 1, 1989. The offense formerly known as child abuse is replaced by §§ 948.03, Physical Abuse Of A Child (see Wis JI-Criminal 2108 through 2113) and 948.04, Causing Mental Harm To A Child (see Wis JI-Criminal 2116).

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1221C FAILURE TO REPORT CHILD ABUSE — § 48.981(2), (3), and (6)

[INSTRUCTION RENUMBERED — SEE WIS JI-CRIMINAL 2119]

COMMENT

Wis JI-Criminal 1221C was approved by the Committee in August 1987. It was renumbered Wis JI-Criminal 2119 in June 1992.

This instruction dealt with violations of § 48.981, which requires reporting of child abuse by designated persons. It was originally numbered "1221C" to follow the instruction for the crime of child abuse, then defined in § 940.201. Child abuse offenses are now defined in §§ 948.03 and 948.04 and are addressed by Wis JI-Criminal 2108 through 2116. Thus, former Wis JI-Criminal 1221C was renumbered to Wis JI-Criminal 2119 to follow the instructions for the child abuse crimes.

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1222 SUBSTANTIAL BATTERY WITH INTENT TO CAUSE BODILY HARM — § 940.19(2)

Statutory Definition of the Crime

Substantial battery, as defined in § 940.19(2) of the Criminal Code of Wisconsin, is committed by one who causes substantial bodily harm to another by an act done with the intent to cause bodily harm to that person or another.

State's Burden of Proof

Before you may find the defendant guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following two elements were present.

Elements of the Crime That the State Must Prove

1. The defendant caused substantial bodily harm to (name of victim).

   "Cause" means that the defendant's act was a substantial factor in producing the substantial bodily harm.[1]

   "Substantial bodily harm" means bodily injury that causes [a laceration that requires (stitches) (staples) (a tissue adhesive)] [any fracture of a bone] [a broken nose] [a burn] [a petechia] [a temporary loss of consciousness, sight, or hearing] [a concussion] [a loss or fracture of a tooth].[2]

2. The defendant intended to cause bodily harm to [(name of victim)] [another person].[3]

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"Bodily harm" means physical pain or injury, illness, or any impairment of physical condition.[4]

"Intent to cause bodily harm" means that the defendant had the mental purpose to cause bodily harm to another human being or was aware that (his) (her) conduct was practically certain to cause bodily harm to another human being.[5]

The intent to cause bodily harm must exist at the time of the act causing substantial bodily harm.[6]

Deciding About Intent

You cannot look into a person's mind to find intent. Intent must be found, if found at all, from the defendant's acts, words, and statements, if any, and from all the facts and circumstances in this case bearing upon intent.[7]

Jury's Decision

If you are satisfied beyond a reasonable doubt that both elements of this offense have been proved, you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.

COMMENT

Wis JI-Criminal 1222 was originally published in 1994 and revised in 2000 and 2005. This revision was approved by the Committee in June 2017; it updated the definition of "substantial bodily harm" and added to footnote 2.

Section 940.19(2) was created by 1993 Wisconsin Act 441 (effective date: May 10, 1994). The offense requires the causing of substantial bodily harm with intent to cause bodily harm. The offense is a Class E felony. Note that this offense does not contain a "without consent" element as does "simple battery" under § 940.19(1).

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Subsection (2m) of § 939.66 provides that "a crime which is a less serious or equally serious type of battery than the one charged" qualifies as a lesser included offense of the charged crime. See the Comment to Wis JI-Criminal 1220.

See Wis JI-Criminal 1222A for an instruction integrating the privilege of self-defense with the elements of this offense.

1. The Committee concluded that the simple "substantial factor" definition of cause should be sufficient for most cases. Where there is evidence of more than one possible cause, something like the following might be added:

> There may be more than one cause of bodily harm. The act of one person alone might produce it, or the acts of two or more persons might jointly produce it.

2. This is the definition of "substantial bodily harm" provided in § 939.22(38). It was revised by 2003 Wisconsin Act 223 [effective date: April 27, 2004] to include reference to a laceration requiring "staples or a tissue adhesive" and "a broken nose." Note that the definition provides only a list of harms that constitute "substantial bodily harm." Compare this with the definitions of "bodily harm" [§ 939.22(4)] and "great bodily harm" [§ 939.22(14)] which contain a general category in addition to a list of specific harms: in § 939.22(4) — "any impairment of physical condition," in § 939.22(14) — "other serious bodily injury."

2007 Wisconsin Act 127 [effective date: April 4, 2008] amended the definition of "substantial bodily harm" to include "a petechia" and created sec. 939.22(23) defining the term as ". . . a minute colored spot that appears on the skin, eyes, eyelid, or mucous membrane of a person as a result of a localized hemorrhage or rupture to a blood vessel or capillary."

In a decision addressing "great bodily harm," the Wisconsin Court of Appeals concluded: "Just because all fractures meet the definition of substantial bodily harm, that does not imply that a particular fracture . . . cannot be serious enough to qualify as an "other serious bodily injury for purposes of being great bodily harm." State v. Davis, 2016 WI App 73, 371 Wis.2d 737, 885 N.W.2d 807, ¶21.

3. In most cases, the defendant will be charged with intending to harm the actual victim and the name of the victim should be used in instructing the jury. However, the defendant is also guilty of battery if he intends to harm one person but actually harms another. This is the common law doctrine of transferred intent which has been described as follows in connection with first degree murder:

> It is immaterial that the human being killed is not the one the actor intended to kill. If X shoots at and kills a person who he thinks is Y but who is actually Z, X is as guilty as if he had not been mistaken about the identity of the person killed. The same is true where X shoots at Y intending to kill him, but he misses Y and kills Z. In both of these cases, X has caused "the death of another human being by an act done with intent to kill that person or another." In other words, the section incorporates the common law doctrine of "transferred intent."

1953 Judiciary Committee Report on the Criminal Code, Wisconsin Legislative Council, page 58.

4. This is the definition of "bodily harm" provided in § 939.22(4).

5. See § 939.23(4) and Wis JI-Criminal 923A and 923B.

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6. The elements of this offense are the causing of substantial bodily harm by an act done with intent to cause bodily harm. Therefore, it differs from simple battery primarily with respect to the degree of harm caused. The Committee concluded that this instruction makes the distinction clear but also that it would be appropriate to emphasize that distinction to the jury in a separate paragraph (where, for example, battery is submitted as a lesser included offense).

7. This is the shorter version used to describe the process of finding intent. The Committee concluded that it is suitable for use in most cases. For the longer description of the intent-finding process, see Wis JI-Criminal 923A.

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1222A SUBSTANTIAL BATTERY WITH INTENT TO CAUSE BODILY HARM: SELF-DEFENSE IN ISSUE — § 940.19(2); § 939.48

Statutory Definition of the Crime

Substantial battery, as defined in § 940.19(2) of the Criminal Code of Wisconsin, is committed by one who causes substantial bodily harm to another by an act done with the intent to cause bodily harm to that person or another.

State's Burden of Proof

Before you may find the defendant guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following two elements were present.

Elements of the Crime That the State Must Prove

1. The defendant caused substantial bodily harm to (name of victim).

   "Cause" means that the defendant's act was a substantial factor in producing the substantial bodily harm.[1]

   "Substantial bodily harm" means bodily injury that causes [a laceration that requires (stitches) (staples) (a tissue adhesive)] [any fracture of a bone] [a broken nose] [a burn] [a petechia] [a temporary loss of consciousness, sight, or hearing] [a concussion] [a loss or fracture of a tooth].[2]

2. The defendant intended to cause bodily harm to [(name of victim)] [another person].[3]

   "Bodily harm" means physical pain or injury, illness, or any impairment of physical condition.[4]

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"Intent to cause bodily harm" means that the defendant had the mental purpose to cause bodily harm to another human being or was aware that (his) (her) conduct was practically certain to cause bodily harm to another human being.[5]

The intent to cause bodily harm must exist at the time of the act causing substantial bodily harm.[6]

Deciding About Intent

You cannot look into a person's mind to find intent. Intent must be found, if found at all, from the defendant's acts, words, and statements, if any, and from all the facts and circumstances in this case bearing upon intent.[7]

Self-Defense

Self-defense is an issue in this case. The law of self-defense allows the defendant to threaten or intentionally use force against another only if:[8]

- the defendant believed that there was an actual or imminent unlawful interference with the defendant's person; and
- the defendant believed that the amount of force the defendant used or threatened to use was necessary to prevent or terminate the interference; and
- the defendant's beliefs were reasonable.

Determining Whether Beliefs Were Reasonable

A belief may be reasonable even though mistaken.[9] In determining whether the defendant's beliefs were reasonable, the standard is what a person of ordinary intelligence and prudence would have believed in the defendant's position under the circumstances that existed at the time of the alleged offense.[10] The reasonableness of the defendant's beliefs

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must be determined from the standpoint of the defendant at the time of the defendant's acts and not from the viewpoint of the jury now.

[IF RETREAT IS AN ISSUE, ADD APPROPRIATE INSTRUCTION HERE — SEE WIS JI-CRIMINAL 810.]

[IF THERE IS EVIDENCE THAT THE DEFENDANT PROVOKED THE ATTACK, ADD APPROPRIATE INSTRUCTION HERE — SEE WIS JI-CRIMINAL 815.]

State's Burden of Proof

The State must prove by evidence which satisfies you beyond a reasonable doubt that the defendant did not act lawfully in self-defense.

Jury's Decision

If you are satisfied beyond a reasonable doubt that both elements of this offense have been proved and that the defendant did not act lawfully in self-defense, you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.

COMMENT

Wis JI-Criminal 1222A was originally published in 2001 and revised 2005. This revision was approved by the Committee in June 2017; it updated the definition of "substantial bodily harm" and added to footnote 2.

This instruction combines the uniform instruction for substantial battery with intent to cause bodily harm (1222) with the instruction on the privilege of self-defense (Wis JI-Criminal 800). The Committee concluded that integrating the elements and the privilege provides a clearer statement of all the facts necessary to constitute guilt in a case where self-defense is an issue. This kind of approach was suggested in State v. Staples, 99 Wis.2d 364, 299 N.W.2d 270 (Ct. App. 1980).

1. The Committee concluded that the simple "substantial factor" definition of cause should be sufficient for most cases. Where there is evidence of more than one possible cause, something like the following might be added:

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There may be more than one cause of bodily harm. The act of one person alone might produce it, or the acts of two or more persons might jointly produce it.

2. This is the definition of "substantial bodily harm" provided in § 939.22(38). It was revised by 2003 Wisconsin Act 223 [effective date: April 27, 2004] to include reference to a laceration requiring "staples or a tissue adhesive" and "a broken nose." Note that the definition provides only a list of harms that constitute "substantial bodily harm." Compare this with the definitions of "bodily harm" [§ 939.22(4)] and "great bodily harm" [§ 939.22(14)] which contain a general category in addition to a list of specific harms: in § 939.22(4) — "any impairment of physical condition," in § 939.22(14) — "other serious bodily injury."

2007 Wisconsin Act 127 [effective date: April 4, 2008] amended the definition of "substantial bodily harm" to include "a petechia" and created sec. 939.22(23) defining the term as ". . . a minute colored spot that appears on the skin, eyes, eyelid, or mucous membrane of a person as a result of a localized hemorrhage or rupture to a blood vessel or capillary."

In a decision addressing "great bodily harm," the Wisconsin Court of Appeals concluded: "Just because all fractures meet the definition of substantial bodily harm, that does not imply that a particular fracture . . . cannot be serious enough to qualify as an "other serious bodily injury for purposes of being great bodily harm." State v. Davis, 2016 WI App 73, 371 Wis.2d 737, 885 N.W.2d 807, ¶21.

3. In most cases, the defendant will be charged with intending to harm the actual victim and the name of the victim should be used in instructing the jury. However, the defendant is also guilty of battery if he intends to harm one person but actually harms another. This is the common law doctrine of transferred intent which has been described as follows in connection with first degree murder:

> It is immaterial that the human being killed is not the one the actor intended to kill. If X shoots at and kills a person who he thinks is Y but who is actually Z, X is as guilty as if he had not been mistaken about the identity of the person killed. The same is true where X shoots at Y intending to kill him, but he misses Y and kills Z. In both of these cases, X has caused "the death of another human being by an act done with intent to kill that person or another." In other words, the section incorporates the common law doctrine of "transferred intent."

1953 Judiciary Committee Report on the Criminal Code, Wisconsin Legislative Council, page 58.

4. This is the definition of "bodily harm" provided in § 939.22(4).

5. See § 939.23(4) and Wis JI-Criminal 923A and 923B.

6. The elements of this offense are the causing of substantial bodily harm by an act done with intent to cause bodily harm. Therefore, it differs from simple battery primarily with respect to the degree of harm caused. The Committee concluded that this instruction makes the distinction clear but also that it would be appropriate to emphasize that distinction to the jury in a separate paragraph (where, for example, battery is submitted as a lesser included offense).

7. This is the shorter version used to describe the process of finding intent. The Committee concluded that it is suitable for use in most cases. For the longer description of the intent-finding process, see Wis JI-Criminal 923A.

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8. The instruction on self-defense is adapted from Wis JI-Criminal 800.

9. This treatment of "reasonably believes" is intended to be consistent with the definition provided in § 939.22(32).

10. The phrase "in the defendant's position under the circumstances that existed at the time of the alleged offense" is intended to allow consideration of a broad range of circumstances that relate to the defendant's situation. For example, with children (assuming they are old enough to be criminally charged), the standard relates to a reasonable person of like age, intelligence, and experience. Maichle v. Jonovic, 69 Wis.2d 622, 627-28, 230 N.W.2d 789 (1975).

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1223 SUBSTANTIAL BATTERY WITH INTENT TO CAUSE SUBSTANTIAL BODILY HARM — § 940.19(3)

1223A SUBSTANTIAL BATTERY WITH INTENT TO CAUSE SUBSTANTIAL BODILY HARM: SELF-DEFENSE IN ISSUE — §§ 940.19(3); 939.48

INSTRUCTIONS WITHDRAWN

COMMENT

Wis JI-Criminal 1223 and 1223A were drafted for violations of former § 940.19(3), which prohibited causing substantial bodily harm with intent to cause substantial bodily harm. Section 940.19(3) was repealed by 2001 Wisconsin Act 109 [effective date: February 1, 2003].

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1224 AGGRAVATED BATTERY WITH INTENT TO CAUSE BODILY HARM — § 940.19(4)

Statutory Definition of the Crime

Aggravated battery, as defined in § 940.19(4) of the Criminal Code of Wisconsin, is committed by one who causes great bodily harm to another by an act done with the intent to cause bodily harm to that person or another.

State's Burden of Proof

Before you may find the defendant guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following two elements were present.

Elements of the Crime That the State Must Prove

1. The defendant caused great bodily harm to (name of victim).

   "Cause" means that the defendant's act was a substantial factor in producing the great bodily harm.[1]

   "Great bodily harm" means serious bodily injury.[2] [Injury which creates a substantial risk of death, or which causes serious permanent disfigurement, or which causes a permanent or protracted loss or impairment of the function of any bodily member or organ, or other serious bodily injury is great bodily harm.]

2. The defendant intended to cause bodily harm to [(name of victim)] [another person].[3]

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"Bodily harm" means physical pain or injury, illness, or any impairment of physical condition.[4]

"Intent to cause bodily harm" means that the defendant had the mental purpose to cause bodily harm to another human being or was aware that (his) (her) conduct was practically certain to cause bodily harm to another human being.[5]

The intent to cause bodily harm must exist at the time of act causing great bodily harm.[6]

Deciding About Intent

You cannot look into a person's mind to find intent. Intent must be found, if found at all, from the defendant's acts, words, and statements, if any, and from all the facts and circumstances in this case bearing upon intent.[7]

Jury's Decision

If you are satisfied beyond a reasonable doubt that both elements of this offense have been proved, you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.

COMMENT

Wis JI-Criminal 1224 was originally published in 1994. The revision approved by the Committee in June 2000 involved adoption of a new format, nonsubstantive changes to the text, and updating of the comment. This revision corrected an inadvertent error in the first element.

See Wis JI-Criminal 1224A for an instruction integrating the privilege of self-defense with the elements of this offense.

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This offense was originally defined by § 940.19(1m), which was created by Chapter 111, Laws of 1979. The offense requires the causing of great bodily harm with intent to cause bodily harm and was referred to as "intermediate battery" during the legislative process. (See the Analysis by the Legislative Reference Bureau to 1979 Assembly Bill 169.) 1993 Wisconsin Act 441 renumbered the statute to § 940.19(4) and increased the penalty to a Class D felony. It also eliminated the requirement that the harm be caused "without consent." (Effective date: May 10, 1994.)

1993 Wisconsin Act 441 also amended subsection (2m) of § 939.66 to provide that a "crime which is a less serious or equally serious type of battery than the one charged" is a lesser included offense. (Emphasis added to highlight the 1994 change.) Section 939.66 is intended to resolve the difficulties resulting from the drafting of the battery statutes in terms that did not satisfy the strict "comparison of the elements" test that the Wisconsin Supreme Court has adopted for lesser included offenses. See State v. Richards, 123 Wis.2d 1, 365 N.W.2d 7 (1985), where the court held that simple battery under § 940.19(1) and "intermediate battery" under § 940.19(1m) [now § 940.19(4)] were not lesser included offenses of aggravated battery.

Section 939.66(2m) affects only the legal possibility of submitting the lesser offense; the evidentiary standard for submitting the lesser crime must also be satisfied. See SM-6, Jury Instructions on Lesser Included Offense.

1. The Committee concluded that the simple "substantial factor" definition of cause should be sufficient for most cases. Where there is evidence of more than one possible cause, something like the following might be added:

> There may be more than one cause of bodily harm. The act of one person alone might produce it, or the acts of two or more persons might jointly produce it.

2. The Committee concluded that defining great bodily harm as "serious bodily injury" is sufficient in most cases. The material in brackets is the remainder of the definition found in § 939.22(14) and should be used as needed. The definition was changed by 1987 Wisconsin Act 399 to substitute "substantial risk" for "high probability" in the phrase "substantial risk of death." See Wis JI-Criminal 914.

Whether or not an injury suffered amounts to "great bodily harm" is an issue of fact for the jury to resolve. See Flores v. State, 76 Wis.2d 50, 250 N.W.2d 227 720 (1976).

3. In most cases, the defendant will be charged with intending to harm the actual victim and the name of the victim should be used in instructing the jury. However, the defendant is also guilty of battery if he intends to harm one person but actually harms another. This is the common law doctrine of transferred intent which has been described as follows in connection with first degree murder:

> It is immaterial that the human being killed is not the one the actor intended to kill. If X shoots at and kills a person who he thinks is Y but who is actually Z, X is as guilty as if he had not been mistaken about the identity of the person killed. The same is true where X shoots at Y intending to kill him, but he misses Y and kills Z. In both of these cases, X has caused "the death of another human being by an act done with intent to kill that person or another." In other words, the section incorporates the common law doctrine of "transferred intent."

1953 Judiciary Committee Report on the Criminal Code, Wisconsin Legislative Council, page 58.

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4. This is the definition of "bodily harm" provided in § 939.22(4).

5. See § 939.23(4) and Wis JI-Criminal 923A and 923B [formerly 923.1 and 923.2].

6. The elements of this offense are the causing of great bodily harm by an act done with intent to cause bodily harm. Therefore, it differs from simple battery primarily with respect to the degree of harm caused. The Committee concluded that this instruction makes the distinction clear but also that it would be appropriate to emphasize that distinction to the jury in a separate paragraph (where, for example, battery is submitted as a lesser included offense).

7. This is the shorter version used to describe the process of finding intent. The Committee concluded that it is suitable for use in most cases. For the longer description of the intent-finding process, see Wis JI-Criminal 923A [formerly Wis JI-Criminal 923.1].

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1224A AGGRAVATED BATTERY WITH INTENT TO CAUSE BODILY HARM: SELF-DEFENSE IN ISSUE — §§ 940.19(4); 939.48

Statutory Definition of the Crime

Aggravated battery, as defined in § 940.19(4) of the Criminal Code of Wisconsin, is committed by one who causes great bodily harm to another by an act done with the intent to cause bodily harm to that person or another.

State's Burden of Proof

Before you may find the defendant guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following two elements were present.

Elements of the Crime That the State Must Prove

1. The defendant caused great bodily harm to (name of victim).

   "Cause" means that the defendant's act was a substantial factor in producing the great bodily harm.[1]

   "Great bodily harm" means serious bodily injury. [Injury which creates a substantial risk of death, or which causes serious permanent disfigurement, or which causes a permanent or protracted loss or impairment of the function of any bodily member or organ, or other serious bodily injury is great bodily harm.][2]

2. The defendant intended to cause bodily harm to [(name of victim)] [another person].[3]

   "Bodily harm" means physical pain or injury, illness, or any impairment of physical condition.[4]

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"Intent to cause bodily harm" means that the defendant had the mental purpose to cause bodily harm to another human being or was aware that (his) (her) conduct was practically certain to cause bodily harm to another human being.[5]

The intent to cause bodily harm must exist at the time of act causing great bodily harm.[6]

Deciding About Intent

You cannot look into a person's mind to find intent. Intent must be found, if found at all, from the defendant's acts, words, and statements, if any, and from all the facts and circumstances in this case bearing upon intent.[7]

Self-Defense

Self-defense is an issue in this case. The law of self-defense allows the defendant to threaten or intentionally use force against another only if:[8]

- the defendant believed that there was an actual or imminent unlawful interference with the defendant's person; and
- the defendant believed that the amount of force the defendant used or threatened to use was necessary to prevent or terminate the interference; and
- the defendant's beliefs were reasonable.

[ADD THE FOLLOWING IF THERE IS EVIDENCE THAT THE FORCE USED WAS INTENDED OR LIKELY TO CAUSE DEATH OR GREAT BODILY HARM.]

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[The defendant may intentionally use force which is intended or likely to cause death or great bodily harm only if the defendant reasonably believed that the force used was necessary to prevent imminent death or great bodily harm to (himself) (herself).][9]

Determining Whether Beliefs Were Reasonable

A belief may be reasonable even though mistaken.[10] In determining whether the defendant's beliefs were reasonable, the standard is what a person of ordinary intelligence and prudence would have believed in the defendant's position under the circumstances that existed at the time of the alleged offense.[11] The reasonableness of the defendant's beliefs must be determined from the standpoint of the defendant at the time of the defendant's acts and not from the viewpoint of the jury now.

[IF RETREAT IS AN ISSUE, ADD APPROPRIATE INSTRUCTION HERE — SEE WIS JI-CRIMINAL 810.]

[IF THERE IS EVIDENCE THAT THE DEFENDANT PROVOKED THE ATTACK, ADD APPROPRIATE INSTRUCTION HERE — SEE WIS JI-CRIMINAL 815.]

State's Burden of Proof

The State must prove by evidence which satisfies you beyond a reasonable doubt that the defendant did not act lawfully in self-defense.

Jury's Decision

If you are satisfied beyond a reasonable doubt that both elements of this offense have been proved and that the defendant did not act lawfully in self-defense, you should find the defendant guilty.

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If you are not so satisfied, you must find the defendant not guilty.

COMMENT

Wis JI-Criminal 1224A was approved by the Committee in June 2000.

This instruction combines the uniform instruction for aggravated battery with intent to cause bodily harm (Wis JI-Criminal 1224) with the instruction on the privilege of self-defense (Wis JI-Criminal 800). The Committee concluded that integrating the elements and the privilege provides a clearer statement of all the facts necessary to constitute guilt in a case where self-defense is an issue. This kind of approach was suggested in State v. Staples, 99 Wis.2d 364, 299 N.W.2d 270 (Ct. App. 1980).

1. If a more extensive definition of "cause" is necessary, see Wis JI-Criminal 901.

2. The Committee concluded that defining great bodily harm as "serious bodily injury" is sufficient in most cases. The material in brackets is the remainder of the definition found in § 939.22(14) and should be used as needed. The definition was changed by 1987 Wisconsin Act 399 to substitute "substantial risk" for "high probability" in the phrase "substantial risk of death." See Wis JI-Criminal 914.

Whether or not an injury suffered amounts to "great bodily harm" is an issue of fact for the jury to resolve. See Flores v. State, 76 Wis.2d 50, 250 N.W.2d 227 720 (1976).

3. In most cases, the defendant will be charged with intending to harm the actual victim and the name of the victim should be used in instructing the jury. However, the defendant is also guilty of battery if he intends to harm one person but actually harms another. This is the common law doctrine of transferred intent which has been described as follows in connection with first degree murder:

> It is immaterial that the human being killed is not the one the actor intended to kill. If X shoots at and kills a person who he thinks is Y but who is actually Z, X is as guilty as if he had not been mistaken about the identity of the person killed. The same is true where X shoots at Y intending to kill him, but he misses Y and kills Z. In both of these cases, X has caused "the death of another human being by an act done with intent to kill that person or another." In other words, the section incorporates the common law doctrine of "transferred intent."

1953 Judiciary Committee Report on the Criminal Code, Wisconsin Legislative Council, page 58.

4. This is the definition of "bodily harm" provided in § 939.22(4).

5. See § 939.23(4) and Wis JI-Criminal 923A and 923B [formerly 923.1 and 923.2].

6. The elements of this offense are the causing of great bodily harm by an act done with intent to cause bodily harm. Therefore, it differs from simple battery primarily with respect to the degree of harm caused. The Committee concluded that this instruction makes the distinction clear but also that it would be appropriate to emphasize that distinction to the jury in a separate paragraph (where, for example, battery is

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submitted as a lesser included offense). [After the 1994 change in the statute, this offense also differs from simple battery in that this offense no longer requires that the harm be caused "without consent" while simple battery retains a "without consent" element.]

7. This is the shorter version used to describe the process of finding intent. The Committee concluded that it is suitable for use in most cases. For the longer description of the intent-finding process, see Wis JI-Criminal 923A [formerly Wis JI-Criminal 923.1].

8. The instruction on self-defense is adapted from Wis JI-Criminal 800.

9. See § 939.48(1).

10. This treatment of "reasonably believes" is intended to be consistent with the definition provided in § 939.22(32).

11. The phrase "in the defendant's position under the circumstances that existed at the time of the alleged offense" is intended to allow consideration of a broad range of circumstances that relate to the defendant's situation. For example, with children (assuming they are old enough to be criminally charged), the standard relates to a reasonable person of like age, intelligence, and experience. Maichle v. Jonovic, 69 Wis.2d 622, 627-28, 230 N.W.2d 789 (1975).

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1225 AGGRAVATED BATTERY WITH INTENT TO CAUSE GREAT BODILY HARM — § 940.19(5)

Statutory Definition of the Crime

Aggravated battery, as defined in § 940.19(5) of the Criminal Code of Wisconsin, is committed by one who causes great bodily harm to another by an act done with the intent to cause great bodily harm to that person or another.

State's Burden of Proof

Before you may find the defendant guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following two elements were present.

Elements of the Crime That the State Must Prove

1. The defendant caused great bodily harm to (name of victim).

   "Cause" means that the defendant's act was a substantial factor in producing the great bodily harm.[1]

   "Great bodily harm" means serious bodily injury.[2] [Injury which creates a substantial risk of death, or which causes serious permanent disfigurement, or which causes a permanent or protracted loss or impairment of the function of any bodily member or organ, or other serious bodily injury is great bodily harm.]

2. The defendant intended to cause great bodily harm to [(name of victim)] [another person].[3]

   "Intent to cause great bodily harm" means that the defendant had the mental purpose to cause great bodily harm to another human being or was aware that (his)

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(her) conduct was practically certain to cause great bodily harm to another human being.[4]

Deciding About Intent

You cannot look into a person's mind to find intent. Intent must be found, if found at all, from the defendant's acts, words, and statements, if any, and from all the facts and circumstances in this case bearing upon intent.[5]

Jury's Decision

If you are satisfied beyond a reasonable doubt that both elements of this offense have been proved, you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.

COMMENT

Wis JI-Criminal 1225 was originally published in 1994 and revised in 2001. This revision was approved by the Committee in February 2003. It reflects changes made in the statute by 2001 Wisconsin Act 109.

See Wis JI-Criminal 1225A for an instruction integrating the privilege of self-defense with the elements of this offense.

Subsection (5) of § 940.19 was amended by 2001 Wisconsin Act 109 (effective date: February 1, 2003) to delete intent to cause "substantial bodily harm." The subsection now prohibits causing great bodily harm with intent to cause great bodily harm.

1993 Wisconsin Act 441 amended subsection (2m) of § 939.66 to provide that a "crime which is a less serious or equally serious type of battery than the one charged" is a lesser included offense. (Emphasis added to highlight the 1994 change.) As a Class E felony, aggravated battery is the most serious type of battery. Thus, all other types of battery are lesser included offenses.

Subsection 939.66(2m) is intended to resolve the difficulties resulting from the drafting of the battery statutes in terms that did not satisfy the strict "comparison of the elements" test that the Wisconsin Supreme Court has adopted for lesser included offenses. See State v. Richards, 123 Wis.2d 1, 365 N.W.2d 7 (1985),

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where the court held that simple battery under § 940.19(1) and "intermediate battery" under § 940.19(1m) were not lesser included offenses of aggravated battery.

Subsection 939.66(2m) affects only the legal possibility of submitting the lesser offense; the evidentiary standard for submitting the lesser crime must also be satisfied. See SM-6, Jury Instructions on Lesser Included Offenses.

1. The Committee concluded that the simple "substantial factor" definition of cause should be sufficient for most cases. Where there is evidence of more than one possible cause, something like the following might be added:

> There may be more than one cause of bodily harm. The act of one person alone might produce it, or the acts of two or more persons might jointly produce it.

2. The Committee concluded that defining great bodily harm as "serious bodily injury" is sufficient in most cases. The material in brackets is the remainder of the definition found in § 939.22(14) and should be used as needed. The definition was changed by 1987 Wisconsin Act 399 to substitute "substantial risk" for "high probability" in the phrase "substantial risk of death." See Wis JI-Criminal 914.

Whether or not an injury suffered amounts to "great bodily harm" is an issue of fact for the jury to resolve. See Flores v. State, 76 Wis.2d 50, 250 N.W.2d 227 720 (1976).

3. In most cases, the defendant will be charged with intending to harm the actual victim and the name of the victim should be used in instructing the jury. However, the defendant is also guilty of battery if he intends to harm one person but actually harms another. This is the common law doctrine of transferred intent which has been described as follows in connection with first degree murder:

> It is immaterial that the human being killed is not the one the actor intended to kill. If X shoots at and kills a person who he thinks is Y but who is actually Z, X is as guilty as if he had not been mistaken about the identity of the person killed. The same is true where X shoots at Y intending to kill him, but he misses Y and kills Z. In both of these cases, X has caused "the death of another human being by an act done with intent to kill that person or another." In other words, the section incorporates the common law doctrine of "transferred intent."

1953 Judiciary Committee Report on the Criminal Code, Wisconsin Legislative Council, page 58.

4. See § 939.23(4) and Wis JI-Criminal 923A and 923B [formerly 923.1 and 923.2].

5. This is the shorter version used to describe the process of finding intent. The Committee concluded that it is suitable for use in most cases. For the longer description of the intent-finding process, see Wis JI-Criminal 923A [formerly Wis JI-Criminal 923.1].

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1225A AGGRAVATED BATTERY WITH INTENT TO CAUSE GREAT BODILY HARM: SELF-DEFENSE IN ISSUE — §§ 940.19(5); 939.48

Statutory Definition of the Crime

Aggravated battery, as defined in § 940.19(5) of the Criminal Code of Wisconsin, is committed by one who causes great bodily harm to another by an act done with the intent to cause great bodily harm to that person or another.

State's Burden of Proof

Before you may find the defendant guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following two elements were present.

Elements of the Crime That the State Must Prove

1. The defendant caused great bodily harm to (name of victim).

   "Cause" means that the defendant's act was a substantial factor in producing the great bodily harm.[1]

   "Great bodily harm" means serious bodily injury.[2] [Injury which creates a substantial risk of death, or which causes serious permanent disfigurement, or which causes a permanent or protracted loss or impairment of the function of any bodily member or organ, or other serious bodily injury is great bodily harm.]

2. The defendant intended to cause great bodily harm to [(name of victim)] [another person].[3]

   "Intent to cause great bodily harm" means that the defendant had the mental purpose to cause great bodily harm to another human being or was aware that (his)

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(her) conduct was practically certain to cause great bodily harm to another human being.[4]

Deciding About Intent

You cannot look into a person's mind to find intent. Intent must be found, if found at all, from the defendant's acts, words, and statements, if any, and from all the facts and circumstances in this case bearing upon intent.[5]

Self-Defense

Self-defense is an issue in this case. The law of self-defense allows the defendant to threaten or intentionally use force against another only if:[6]

- the defendant believed that there was an actual or imminent unlawful interference with the defendant's person; and
- the defendant believed that the amount of force the defendant used or threatened to use was necessary to prevent or terminate the interference; and
- the defendant's beliefs were reasonable.

[ADD THE FOLLOWING IF THERE IS EVIDENCE THAT THE FORCE USED WAS INTENDED OR LIKELY TO CAUSE DEATH OR GREAT BODILY HARM.]

[The defendant may intentionally use force which is intended or likely to cause death or great bodily harm only if the defendant reasonably believed that the force used was necessary to prevent imminent death or great bodily harm to (himself) (herself).][7]

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Determining Whether Beliefs Were Reasonable

A belief may be reasonable even though mistaken.[8] In determining whether the defendant's beliefs were reasonable, the standard is what a person of ordinary intelligence and prudence would have believed in the defendant's position under the circumstances that existed at the time of the alleged offense.[9] The reasonableness of the defendant's beliefs must be determined from the standpoint of the defendant at the time of the defendant's acts and not from the viewpoint of the jury now.

[IF RETREAT IS AN ISSUE, ADD APPROPRIATE INSTRUCTION HERE — SEE WIS JI-CRIMINAL 810.]

[IF THERE IS EVIDENCE THAT THE DEFENDANT PROVOKED THE ATTACK, ADD APPROPRIATE INSTRUCTION HERE — SEE WIS JI-CRIMINAL 815.]

State's Burden of Proof

The State must prove by evidence which satisfies you beyond a reasonable doubt that the defendant did not act lawfully in self-defense.

Jury's Decision

If you are satisfied beyond a reasonable doubt that both elements of this offense have been proved and that the defendant did not act lawfully in self-defense, you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.

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COMMENT

Wis JI-Criminal 1225A was originally published in 2001. This revision was approved by the Committee in February 2003. It reflects changes made in the statute by 2001 Wisconsin Act 109.

Subsection (5) of § 940.19 was amended by 2001 Wisconsin Act 109 (effective date: February 1, 2003) to delete intent to cause "substantial bodily harm." The subsection now prohibits causing great bodily harm with intent to cause great bodily harm.

This instruction combines the uniform instruction for aggravated battery with intent to cause substantial or great bodily harm (Wis JI-Criminal 1225) with the instruction on the privilege of self-defense (Wis JI-Criminal 800). The Committee concluded that integrating the elements and the privilege provides a clearer statement of all the facts necessary to constitute guilt in a case where self-defense is an issue. This kind of approach was suggested in State v. Staples, 99 Wis.2d 364, 299 N.W.2d 270 (Ct. App. 1980).

This instruction assumes the simplest case in that references to instructions on, for example, retreat and provocation are not included. The complete version of Wis JI-Criminal 1225 and Wis JI-Criminal 800, and footnotes, should be reviewed before using this instruction.

1. The Committee concluded that the simple "substantial factor" definition of cause should be sufficient for most cases. Where there is evidence of more than one possible cause, something like the following might be added:

> There may be more than one cause of bodily harm. The act of one person alone might produce it, or the acts of two or more persons might jointly produce it.

2. The Committee concluded that defining great bodily harm as "serious bodily injury" is sufficient in most cases. The material in brackets is the remainder of the definition found in § 939.22(14) and should be used as needed. The definition was changed by 1987 Wisconsin Act 399 to substitute "substantial risk" for "high probability" in the phrase "substantial risk of death." See Wis JI-Criminal 914.

Whether or not an injury suffered amounts to "great bodily harm" is an issue of fact for the jury to resolve. See Flores v. State, 76 Wis.2d 50, 250 N.W.2d 227 720 (1976).

3. In most cases, the defendant will be charged with intending to harm the actual victim and the name of the victim should be used in instructing the jury. However, the defendant is also guilty of battery if he intends to harm one person but actually harms another. This is the common law doctrine of transferred intent which has been described as follows in connection with first degree murder:

> It is immaterial that the human being killed is not the one the actor intended to kill. If X shoots at and kills a person who he thinks is Y but who is actually Z, X is as guilty as if he had not been mistaken about the identity of the person killed. The same is true where X shoots at Y intending to kill him, but he misses Y and kills Z. In both of these cases, X has caused "the death of another human being by an act done with intent to kill that person or another." In other words, the section incorporates the common law doctrine of "transferred intent."

1953 Judiciary Committee Report on the Criminal Code, Wisconsin Legislative Council, page 58.

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4. See § 939.23(4) and Wis JI-Criminal 923A and 923B [formerly 923.1 and 923.2].

5. This is the shorter version used to describe the process of finding intent. The Committee concluded that it is suitable for use in most cases. For the longer description of the intent-finding process, see Wis JI-Criminal 923A [formerly Wis JI-Criminal 923.1].

6. The instruction on self-defense is adapted from Wis JI-Criminal 800.

7. See § 939.48(1).

8. This treatment of "reasonably believes" is intended to be consistent with the definition provided in § 939.22(32).

9. The phrase "in the defendant's position under the circumstances that existed at the time of the alleged offense" is intended to allow consideration of a broad range of circumstances that relate to the defendant's situation. For example, with children (assuming they are old enough to be criminally charged), the standard relates to a reasonable person of like age, intelligence, and experience. Maichle v. Jonovic, 69 Wis.2d 622, 627-28, 230 N.W.2d 789 (1975).

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1226 BATTERY WITH SUBSTANTIAL RISK OF GREAT BODILY HARM — § 940.19(6)

Statutory Definition of the Crime

Battery, as defined in § 940.19(6) of the Criminal Code of Wisconsin, is committed by one who intentionally causes bodily harm to another by conduct which creates a substantial risk of great bodily harm.

State's Burden of Proof

Before you may find the defendant guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following four elements were present.

Elements of the Crime That the State Must Prove

1. The defendant caused bodily harm to (name of victim).

   "Cause" means that the defendant's act was a substantial factor in producing the bodily harm.[1]

   "Bodily harm" means physical pain or injury, illness, or any impairment of physical condition.[2]

2. The defendant intended to cause bodily harm to [(name of victim)] [another person].[3]

   "Intent to cause bodily harm" means that the defendant had the mental purpose to cause bodily harm to another human being or was aware that (his) (her) conduct was practically certain to cause bodily harm to another human being.[4]

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3. The defendant's conduct created a substantial risk of great bodily harm.

"Great bodily harm" means serious bodily injury.[5] [Injury which creates a substantial risk of death, or which causes serious permanent disfigurement, or which causes a permanent or protracted loss or impairment of the function of any bodily member or organ, or other serious bodily injury is great bodily harm.]

[IF THERE IS EVIDENCE THAT THE VICTIM WAS 62 YEARS OF AGE OR OLDER, ADD THE FOLLOWING.][6]

[If you find that (name of victim) was age 62 or older at the time of the offense, you may find from that fact alone that the defendant's conduct created a substantial risk of great bodily harm, but you are not required to do so, and you must be satisfied beyond a reasonable doubt from all the evidence that the defendant's conduct created a substantial risk of great bodily harm.][7]

[IF THERE IS EVIDENCE THAT THE VICTIM HAD A PHYSICAL DISABILITY, ADD THE FOLLOWING.][8]

[If you find that (name of victim) had a physical disability at the time of the offense, and that the disability was discernible by an ordinary person viewing the victim, or was actually known by the defendant,[9] you may find from that fact alone that the defendant's conduct created a substantial risk of great bodily harm. But you are not required to do so, and you must be satisfied beyond a reasonable doubt from all the evidence that the defendant's conduct created a substantial risk of great bodily harm.][10]

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4. The defendant knew that (his) (her) conduct created a substantial risk of great bodily harm.[11]

Deciding About Intent and Knowledge

You cannot look into a person's mind to find intent and knowledge. Intent and knowledge must be found, if found at all, from the defendant's acts, words, and statements, if any, and from all the facts and circumstances in this case bearing upon intent and knowledge.[12]

Jury's Decision

If you are satisfied beyond a reasonable doubt that all four elements of this offense have been proved, you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.

COMMENT

Wis JI-Criminal 1226 was originally published in 1994 and revised in 2001. This revision was approved by the Committee in June 2014 and involved a nonsubstantive correction to the text.

This offense was originally defined in § 940.19(3), created by Chapter 113, Laws of 1979. It was renumbered § 940.19(6) by 1993 Wisconsin Act 441 and the penalty increased to a Class D felony. The law was originally drafted as a straightforward "Battery To Older Persons" provision, with an increased penalty for battery committed against persons 60 years of age or older (see 1979 Assembly Bill 8). The bill was amended to apply to all batteries involving a "high probability of great bodily harm," with the facts that the victim was over age 62 or suffering from physical disability creating "a rebuttable presumption of conduct creating a high probability of great bodily harm." The 1994 revision changed "high probability" to "substantial risk." Instructing the jury when the "presumption" is in the case is discussed at notes 6 and 7, below.

The 1994 revision corrected what was probably an inadvertent technical error in the former statute. The introductory section of § 940.19(3), 1991-92 Wis. Stats., read as follows (emphasis added):

> Whoever intentionally causes bodily harm to another by conduct which creates a <u>high probability</u> of great bodily harm is guilty of a Class E felony. A rebuttable presumption of conduct creating a <u>substantial risk</u> of great bodily harm arises . . .

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1993 Wisconsin Act 441 preserved the inconsistency when it recreated former sub. (3) as sub. (b), but "high probability" was changed to "substantial risk" by a "revisor's bill," 1994 Wisconsin Act 483.

Subsection (2m) of § 939.66 provides that "a crime which is a less serious or equally serious type of battery than the one charged" qualifies as a lesser included offense of the charged crime. See the Comment to Wis JI-Criminal 1220.

1. The Committee concluded that the simple "substantial factor" definition of cause should be sufficient for most cases. Where there is evidence of more than one possible cause, something like the following might be added:

> There may be more than one cause of bodily harm. The act of one person alone might produce it, or the acts of two or more persons might jointly produce it.

2. This is the definition of "bodily harm" provided in § 939.22(4).

3. In most cases, the defendant will be charged with intending to harm the actual victim and the name of the victim should be used in instructing the jury. However, the defendant is also guilty of battery if he intends to harm one person but actually harms another. This is the common law doctrine of transferred intent which has been described as follows in connection with first degree murder:

> It is immaterial that the human being killed is not the one the actor intended to kill. If X shoots at and kills a person who he thinks is Y but who is actually Z, X is as guilty as if he had not been mistaken about the identity of the person killed. The same is true where X shoots at Y intending to kill him, but he misses Y and kills Z. In both of these cases, X has caused "the death of another human being by an act done with intent to kill that person or another." In other words, the section incorporates the common law doctrine of "transferred intent."

1953 Judiciary Committee Report on the Criminal Code, Wisconsin Legislative Council, page 58.

4. See § 939.23(4) and Wis JI-Criminal 923A and 923B.

5. The Committee concluded that defining great bodily harm as "serious bodily injury" is sufficient in most cases. The material in brackets is the remainder of the definition found in § 939.22(14) and should be used as needed. The definition was changed by 1987 Wisconsin Act 399 to substitute "substantial risk" for "high probability" in the phrase "substantial risk of death." See Wis JI-Criminal 914.

Whether or not an injury suffered amounts to "great bodily harm" is an issue of fact for the jury to resolve. See Flores v. State, 76 Wis.2d 50, 250 N.W.2d 227 720 (1976).

6. See § 903.03(2) regarding the submission of presumptions to the jury. It provides in part:

> When the presumed fact establishes guilt or is an element of the offense or negates a defense, the judge may submit the question of guilt or the existence of the presumed fact to the jury, if, but only if, a reasonable juror on the evidence as a whole, including the evidence of the basic facts, could find guilt or the presumed fact beyond a reasonable doubt.

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Therefore, there must be sufficient evidence of the "presumed fact"—substantial risk of great bodily harm—to enable a reasonable juror to be convinced of its existence beyond a reasonable doubt, before an instruction on the "presumption" flowing from the "basic facts" of age over 62 or disability may be submitted.

7. This paragraph on the "rebuttable presumption" established by § 940.19(3) follows the rule set out in § 903.03(3) for instructing the jury on presumptions in criminal cases. See Wis JI-Criminal 225 for a discussion of the Committee's approach to instructing on "presumptions" and "prima facie" cases.

8. See note 6, supra.

The Wisconsin Supreme Court addressed the "physical disability" presumption in State v. Crowley, 143 Wis.2d 324, 422 N.W.2d 847 (1988). The court dealt with two issues: the general validity of the presumption relating a physical disability to the likelihood of great bodily harm; and the validity of associating physical disability with the condition of the victim in the case before the court.

As to the first issue, the court applied the rule of Ulster County Court v. Allen, 442 U.S. 140 (1979), described as holding that "a presumption may be impermissible if there is no reasonable nexus or relationship between the evidentiary facts and the fact to be presumed." 143 Wis.2d 324, 339. The court concluded that "the relationship, the nexus, between physical disability and the likelihood that violence against one physically disabled will lead to great bodily harm, is unassailable. . . ." 143 Wis.2d 324, 339.

The court also concluded that the victim in the Crowley case, who was 48 years old, weighed 96 lbs., was 4' 9" in height, and was legally blind, was "physically disabled" within the meaning of the statute. The court concluded that disability need not be found as a medical fact but only as a matter discernibly evident to a lay person. Further, the court held that it is not necessary that the victim qualify as a "handicapped person" as that term is used in the Fair Employment laws.

9. The 1994 revision of the statute added the phrase, "or that is actually known by the actor," to sub. (6)(b).

10. See note 7, supra.

11. Subsection 940.19(6) applies to those who "intentionally cause bodily harm by conduct which creates a substantial risk of great bodily harm." Subsection 939.23(3) provides that when "intentionally" is used in a criminal statute, it requires that the actor "have knowledge of those facts which are necessary to make his conduct criminal and which are set forth after the word 'intentionally'." The Committee concluded that this requires that the defendant charged under § 940.19(6) must have known that his conduct created a substantial risk of great bodily harm. The Committee further concluded that it need not be established that the defendant knew that the victim was over the age of 62 or suffering from a physical disability, because those two factors are essentially treated only as evidence of the fourth element of the crime: that the defendant's conduct has created a substantial risk of great bodily harm. See notes 6 through 10, supra.

12. This is the shorter version used to describe the process of finding intent. The Committee concluded that it is suitable for use in most cases. For the longer description of the intent-finding process, see Wis JI-Criminal 923A.

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1227 BATTERY TO AN UNBORN CHILD — § 940.195(1), (2), (4), (5)[1]

Statutory Definition of the Crime

Battery to an unborn child, as defined in § 940.195 of the Criminal Code of Wisconsin, is committed by one who causes [(bodily harm) (substantial bodily harm) (great bodily harm)][2] to an unborn child by an act done with the intent to cause [(bodily harm) (or) (great bodily harm)][3] [(to that unborn child) (or) (to the woman who is pregnant with that unborn child) (or) (to another)].[4]

State's Burden of Proof

Before you may find the defendant guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following two elements were present.

Elements of the Crime That the State Must Prove

1. The defendant caused (bodily harm) (substantial bodily harm) (great bodily harm) to an unborn child.

   "Cause" means that the defendant's act was a substantial factor in producing the (bodily harm) (substantial bodily harm) (great bodily harm).[5]

   ["Bodily harm" means physical pain or injury, illness, or any impairment of physical condition.][6]

   ["Substantial bodily harm" means bodily injury that causes a laceration that requires stitches; any fracture of a bone; a burn; a temporary loss of consciousness, sight, or hearing; a concussion; or a loss or fracture of a tooth.][7]

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["Great bodily harm" means serious bodily injury.[8] (Injury which creates a substantial risk of death, or which causes serious permanent disfigurement, or which causes a permanent or protracted loss or impairment of the function of any bodily member or organ, or other serious bodily injury is great bodily harm.)]

"Unborn child" means any individual of the human species from fertilization until birth that is gestating inside a woman.[9]

2. The defendant intended to cause [(bodily harm) (or) (great bodily harm)] [(to the unborn child) (or) (to the woman who was pregnant with the unborn child) (or) (to another)].

"Intent to cause [(bodily harm) (or) (great bodily harm)]" means that the defendant had the mental purpose to cause [(bodily harm) (or) (great bodily harm)] [(to an unborn child) (or) (to the woman who was pregnant with the unborn child) (or) (to another human being)] or was aware that his or her conduct was practically certain to cause [(bodily harm) (or) (great bodily harm)] [(to an unborn child) (or) (to the woman who was pregnant with the unborn child) (or) (to another human being)].

[DEFINE THE INTENDED HARM IF IT IS DIFFERENT FROM THE HARM CAUSED][10]

Deciding About Intent

You cannot look into a person's mind to find intent. Intent must be found, if found at all, from the defendant's acts, words, and statements, if any, and from all the facts and circumstances in this case bearing upon intent.

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Jury's Decision

If you are satisfied beyond a reasonable doubt that both elements of this offense have been proved, you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.

COMMENT

Wis JI-Criminal 1227 was originally published in 1999. This revision was approved by the Committee in February, 2003. It adopted a new format and revised the Comment to reflect revisions of § 940.195 by 2001 Wisconsin Act 109.

This instruction is drafted to provide a model for the offenses defined in § 940.195, which was created by 1997 Wisconsin Act 295 [effective date: July 1, 1998]. Two changes were made in the statute by 2001 Wisconsin Act 109: sub. (3) — causing substantial bodily harm to an unborn child with intent to cause substantial bodily harm — was repealed; sub. (5) was amended to delete the reference to intent to cause "substantial bodily harm." The effective date of those changes was February 1, 2003.

As amended by 2001 Wisconsin Act 109, there are five subsections of § 940.195, each roughly the same as the subsections of § 940.19, the general battery statute. Act 109 repealed former subsection (3), which applied to causing substantial bodily harm with intent to cause substantial bodily harm. The approach used in this instruction ought to work for all violations except for violations under sub. (6): intentionally causing bodily harm by conduct that creates a substantial risk of great bodily harm. See the discussion in footnote 1, suggesting that Wis JI-Criminal 1226 be used as a model for violations of sub. (6).

Section 939.75, also created by Act 295, defines "unborn child" and sets forth several exceptions to the applicability of the revised statutes. Subsection (2)(b) recognizes the following exceptions:

- induced abortions [subd. 1.]
- acts committed in accordance with usual and customary standards of medical practice during diagnostic testing or therapeutic treatment by a licensed physician [sub. 2.]
- an act by a health care provider that is in accordance with a pregnant woman's power of attorney for health care, etc. [subd. 2h.]
- an act by a woman who is pregnant with an unborn child [subd. 3.]
- the lawful prescription, dispensation or administration, and the use by any a woman of, any medicine, drug or device that is used as a method of birth control or is intended to prevent pregnancy. [subd. 4]

Subsection (3) provides that if any of these exceptions are "placed in issue by the trial evidence, the state must prove beyond a reasonable doubt that the facts constituting the exception do not exist . . ." Thus, these exceptions are to be handled in the same manner as, for example, the mitigating circumstance of adequate

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provocation under the general homicide law: once supported by some evidence, the absence of the exception becomes a fact the state must prove. The Committee decided not to draft instructions for the absence of these exceptions because it appeared to the Committee that their applicability would most likely be determined before charges were filed or at least before trial.

1. As amended by 2001 Wisconsin Act 109, there are five subsections of § 940.195, each roughly the same as the subsections of § 940.19, the general battery statute. Act 109 repealed former subsection (3) which applied to causing substantial bodily harm with intent to cause substantial bodily harm.

The offenses differ from one another depending on three variables: 1) the type of harm caused — whether it was bodily harm, substantial bodily harm, or great bodily harm; 2) the type of harm intended to be caused — whether it was bodily harm or great bodily harm; and, 3) the entity intended to be harmed — the unborn child, the woman who is pregnant with the unborn child, or another. This instruction is set up with these alternatives in brackets throughout, allowing the user to select the alternatives that apply to the offense charged. This approach ought to work for all violations except for violations under sub. (6): intentionally causing bodily harm by conduct that creates a substantial risk of great bodily harm. For that offense, Wis JI-Criminal 1226 can be used as a model and should be modified to refer to causing harm to an unborn child as illustrated by the first element of this instruction.

2. Select the alternative within the bracket that applies. Subs. (1) and (6) of § 940.195 require causing bodily harm; sub. (2) requires causing substantial bodily harm; subs. (4) and (5) require causing great bodily harm.

3. Select the alternative within the bracket that applies. Subs. (1), (2), and (4) of § 940.195 require intent to cause bodily harm; sub. (5) requires intent to cause great bodily harm. The alternatives do not address the offense defined in sub. (6): intentionally causing bodily harm by conduct that creates a substantial risk of great bodily harm. For that offense, Wis JI-Criminal 1226 can be used as a model, modified to refer to causing harm to an unborn child as illustrated by the first element of this instruction.

4. Select the alternative within the bracket that applies. This set of options includes the traditional one of defining the crime as involving intent to harm the victim (here, the unborn child), "or another" (sometimes termed "transferred intent"), and the addition of intent to harm the woman who is pregnant with the unborn child. More than one alternative may be selected if supported by the evidence.

5. If a more extensive definition of "cause" is necessary, see Wis JI-Criminal 901.

6. This is the definition of "bodily harm" provided in § 939.22(4).

7. This is the definition of "substantial bodily harm" provided in § 939.22(36).

8. The Committee concluded that defining "great bodily harm" as "serious bodily injury" is sufficient in most cases. The material in brackets is the remainder of the definition found in § 939.22(14) and should be used as needed. See Wis JI-Criminal 914 for a complete discussion of "great bodily harm."

9. This is the definition of "unborn child" provided in § 939.75(1).

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10. As amended by 2001 Wisconsin Act 109, the statute defines two offenses where the harm caused is different from the harm intended: sub. (2) covers causing substantial bodily harm with intent to cause bodily harm; sub. (4) covers causing great bodily harm with intent to cause bodily harm. For those cases, "bodily harm" should be separately defined here, as part of the "intent to cause bodily harm" element. If the harm caused and harm intended match, the definition of the term in the first element is sufficient.

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1228 BATTERY BY PRISONER — § 940.20(1)

Statutory Definition of the Crime

Battery by prisoner, as defined in § 940.20(1) of the Criminal Code of Wisconsin, is committed by one who is confined to a [state prison] [(state) (county) (municipal) detention facility] and who intentionally causes bodily harm or a soft tissue injury to (an officer) (an employee) (a visitor) (another inmate) of the (prison) (detention facility) without the consent of that person.

State's Burden of Proof

Before you may find the defendant guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following five elements were present.

Elements of the Crime That the State Must Prove

1. The defendant was a prisoner confined to a [state prison] [(state) (county) (municipal) detention facility].

   This requires that the defendant was confined to a (prison) (detention facility) as a result of a violation of law.[1]

   (Name of institution) is a [state prison] [(state) (county) (municipal) detention facility].[2]

2. The defendant intentionally caused (bodily harm) (a soft tissue injury) to (name of victim).

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"Cause" means that the defendant's act was a substantial factor in producing (bodily harm) (a soft tissue injury).[3]

"Intentionally" means that the defendant had the mental purpose to cause (bodily harm) (a soft tissue injury) to another human being or was aware that (his) (her) conduct was practically certain to cause (bodily harm) (a soft tissue injury) to another human being.[4]

["Bodily harm" means physical pain or injury, illness, or any impairment of physical condition.[5]]

["Soft tissue injury" means an injury that requires medical attention to a tissue that connects, supports, or surrounds other structures and organs of the body and includes tendons, ligaments, fascia, skin, fibrous tissues, fat, synovial membranes, muscles, nerves, and blood vessels.[6]]

3. (Name of victim) was (an officer) (an employee) (a visitor) (another inmate) of (name of institution).

4. The defendant caused (bodily harm) (a soft tissue injury) without the consent of (name of victim).[7]

5. The defendant knew (name of victim) was (an officer) (an employee) (a visitor) (another inmate) of (name of institution) and knew that (name of victim) did not consent to the causing of (bodily harm) (a soft tissue injury).[8]

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Deciding About Intent and Knowledge

You cannot look into a person's mind to find intent and knowledge. Intent and knowledge must be found, if found at all, from the defendant's acts, words, and statements, if any, and from all the facts and circumstances in this case bearing upon intent and knowledge.

Jury's Decision

If you are satisfied beyond a reasonable doubt that all five elements of this offense have been proved, you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.

COMMENT

Wis JI-Criminal 1228 was originally published in 1994 and revised in 2001. This revision was approved by the Committee in December 2011; it revised the instruction to reflect changes made by 2011 Wisconsin Act 74.

2011 Wisconsin Act 74 amended § 940.20(1) to add reference to causing "a soft tissue injury" as defined in § 946.41(2)(c). See footnote 6, below. The effective date of Act 74 is December 2, 2011.

1. The defendant's status as a "prisoner" should rarely be in question, but the Committee concluded there should be some definition of the term in the instruction. The definition in the instruction was adapted from that found in Wis. Stat. § 46.011 and from the decision in State v. Brill, 1 Wis.2d 288, 83 N.W.2d 721 (1957), where the court made the following observations:

> So far as we know, the word "prisoner" has not been defined by this court. Black's Law Dictionary (4th ed.), p. 1358, defines the word as follows:
>
> "One who is deprived of his liberty; one who is against his will kept in confinement or custody."
>
> Webster's New International Dictionary (2d ed.) gives the following definition:
>
> "A person under arrest, in custody or in prison; one involuntarily restrained; a captive; as a prisoner of justice, or war or at the bar; to take one prisoner."

State v. Brill, 1 Wis.2d 288, 291.

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The Brill definition has been cited with approval in several cases involving § 940.20(1). In C.D.M. v. State, 125 Wis.2d 170, 370 N.W.2d 287 (Ct. App. 1985), the court held that a juvenile confined as a delinquent at the Lincoln Hills School was a "prisoner" under § 940.20(1) because he had violated a criminal law and was confined for a correctional objective. 125 Wis.2d 170, 173.

The Committee concluded that "prisoner" includes all persons who are confined to one of the identified institutions as a result of a violation of the law. "Prisoner" is also defined in § 46.011(2) (for purposes of Chapter 46 to 51, 55, and 58) and in § 301.01(2) (for purposes of Chapters 301 to 304). But the Committee concluded that these definitions are not directly applicable here because they are concerned primarily with defining the authority of state agencies.

A person committed to a state mental health facility (in this case, the Mendota Mental Health Institute) after being found not guilty by reason of mental disease or defect, is a "prisoner" for purposes of § 940.20(1), Battery by prisoners. State v. Skampfer, 176 Wis.2d 304, 500 N.W.2d 369 (Ct. App. 1993). The important fact is that the person's liberty was restrained premised on a finding that the person had violated the criminal law.

A probationer who violates a condition of probation and as a result is taken into custody is a prisoner "confined as a result of a violation of the law" as provided in C.D.M., supra, and this instruction. State v. Fitzgerald, 2000 WI App 55, ¶12, 233 Wis.2d 584, 608 N.W.2d 391 [also involving a charge under § 940.20(1).]

2. The institution's status as one of the designated facilities should not be a contested issue in most cases, and the Committee concluded that it is appropriate for the trial court to so instruct the jury.

The question of what institutions are covered by the statute is arguably difficult only with regard to "state detention facilities." "County detention facility" most likely refers to a county jail (and possibly to the House of Correction in Milwaukee County); "municipal detention facility" most likely refers to city jails. But it is not clear what institutions are included in the term "state detention facility." The Committee concluded that the statute may be applied to persons confined in mental health institutes provided their confinement is a result of criminal charges. This interpretation would include those committed for determination of competency to stand trial, those committed as not competent to stand trial, and those committed as not guilty by reason of mental disease or defect. This conclusion is consistent with the decision in State v. Skampfer, see note 1, supra.

Section 302.01 identifies the institutions which are "state prisons." Also see § 302.02 which defines the "precincts" of the state prisons, that is, those locations that are considered part of the prisons for legal purposes.

3. The Committee concluded that the simple "substantial factor" definition of cause should be sufficient for most cases. Where there is evidence of more than one possible cause, something like the following might be added:

> There may be more than one cause of (bodily harm) (a soft tissue injury). The act of one person alone might produce it, or the acts of two or more persons might jointly produce it.

4. See § 939.23(4) and Wis JI-Criminal 923A and 923B.

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5. This is the definition of "bodily harm" provided in § 939.22(4).

6. 2011 Wisconsin Act 74 amended § 940.20(1) to add as an alternative harm the causing of "a soft tissue injury" as defined in § 946.41(2)(c). The definition in the instruction is the one provided in § 946.41(2)(c).

7. If definition of "without consent" is believed to be necessary, see Wis JI-Criminal 948 which provides an instruction based on the definition provided in § 939.22(48). That definition provides that "without consent" means "no consent in fact" or that consent was given because of fear, a claim of legal authority by the defendant, or misunderstanding.

8. The knowledge element is based on the definition of "intentionally" in § 939.23(3): ". . . the actor must have knowledge of those facts which are necessary to make his conduct criminal and which are set forth after the word intentionally."

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1228A BATTERY BY A PERSON COMMITTED UNDER § 980.065 – § 940.20(1g)

Statutory Definition of the Crime

Section 940.20(1g) of the Criminal Code of Wisconsin is violated by a person who is placed in facility under § 980.065 and who intentionally causes bodily harm to an officer, employee, agent, visitor, or other resident of the facility without (his) (her) consent.

State's Burden of Proof

Before you may find the defendant guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following five elements were present.

1. The defendant was placed in a facility under § 980.065.[1]

2. The defendant caused bodily harm to (name of victim).

   "Cause" means that the defendant's conduct was a substantial factor in producing bodily harm.[2]

   "Bodily harm" means physical pain or injury, illness, or any impairment of physical condition.[3]

3. (Name of victim) was (an officer) (an employee) (an agent) (a visitor) (a resident) of the facility.

4. The defendant caused bodily harm to (name of victim) without the consent[4] of (name of victim).

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5. The defendant acted intentionally. This requires that the defendant acted with the mental purpose to cause bodily harm to (name of victim) and knew that (name of victim) did not consent.[5]

Deciding About Intent and Knowledge

You cannot look into a person's mind to find intent or knowledge. Intent and knowledge must be found, if found at all, from the defendant's acts, words, and statements, if any, and from all the facts and circumstances in this case bearing upon intent and knowledge.

Jury's Decision

If you are satisfied beyond a reasonable doubt that all five elements of this offense have been proved, you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.

COMMENT

Wis JI-Criminal 1228A was approved by the Committee in June 2014.

This instruction is drafted for violations of § 940.20(1g) which applies to batteries committed by one committed as a "sexually violent person" under Chapter 980. The statute was created by 2005 Wisconsin Act 434 [effective date: August 1, 2006].

1. The offense definition refers to "placed in a facility under s. 980.065." Section 980.065 designates the place of placement for "a person committed under s. 980.06." A commitment under § 980.06 is the final commitment of a person who has been found to be a sexually violent person.

2. The Committee concluded that the simple "substantial factor" definition of cause should be sufficient for most cases. Where there is evidence of more than one possible cause, something like the following might be added:

> There may be more than one cause of bodily harm. The act of one person alone might produce it, or the acts of two more persons might jointly produce it.

Also see Wis JI-Criminal 901, Cause.

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3. This is the definition provided in § 939.22(4).

4. If definition of "without consent" is believed to be necessary, see Wis JI-Criminal 948 which provides an instruction based on the definition provided in § 939.22(48). That definition provides that "without consent" means "no consent in fact" or that consent was given because of fear, a claim of legal authority by the defendant, or misunderstanding.

5. "Intentionally" requires either mental purpose to cause the result or awareness that the conduct is practically certain to cause it. § 939.23(3). The Committee concluded that the mental purpose alternative is most likely to apply to this offense. See Wis JI-Criminal 923A and 923B.

"Intentionally" also generally requires knowledge of all facts necessary to make the conduct criminal which follow the word "intentionally" in the statute. § 939.23(3). Thus, the defendant must know that the victim did not consent to the causing of bodily harm.

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1229 BATTERY BY A PERSON SUBJECT TO AN INJUNCTION — § 940.20(1m)

Statutory Definition of the Crime

Section 940.20(1m) of the Criminal Code of Wisconsin is violated by a person who is subject to [a domestic abuse] [an harassment][1] injunction and who intentionally causes bodily harm to the petitioner who sought the injunction by an act done without the consent of that person.

State's Burden of Proof

Before you may find the defendant guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following five elements were present.

Elements of the Crime That the State Must Prove

1. (Name of victim) petitioned for [a domestic abuse] [an harassment] injunction against the defendant.
2. At the time of the alleged offense, the defendant was subject to the [domestic abuse] [harassment] injunction.
3. The defendant intentionally caused bodily harm to (name of victim).

   "Cause" means that the defendant's conduct was a substantial factor in producing the bodily harm.[2]

   "Bodily harm" means physical pain or injury, illness, or any impairment of physical condition.[3]

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4. (Name of victim) did not consent to the bodily harm.[4]

5. The defendant knew (name of victim) petitioned for the injunction and knew that (name of victim) did not consent to the causing of bodily harm.[5]

Meaning of "Intentionally"

"Intentionally" means that the defendant had the mental purpose to cause bodily harm to another human being or was aware that the conduct was practically certain to cause bodily harm to another.[6]

Deciding About Intent and Knowledge

You cannot look into a person's mind to find intent or knowledge. Intent and knowledge must be found, if found at all, from the defendant's acts, words, and statements, if any, and from all the facts and circumstances in this case bearing upon intent and knowledge.

Jury's Decision

If you are satisfied beyond a reasonable doubt that all five elements of this offense have been proved, you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.

COMMENT

Wis JI-Criminal 1229 was originally published in 1997 and revised in 2005. This revision was approved by the Committee in October 2015; it corrected a statutory cross reference in footnote 1 and revised the Comment.

Battery by a person subject to an injunction, as defined in § 940.20(1m), was created by 1995 Wisconsin Act 343. [Effective date: June 4, 1996.] Subsection (a) of § 940.20(1m) addresses injunctions issued under § 813.12 - domestic abuse injunctions - and tribal court injunctions filed under § 806.247(3). Subsection (b) of § 940.20(1m) addresses injunctions issued under § 813.125 - harassment injunctions. The offense

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definitions in subs. (a) and (b) are otherwise the same and this instruction may be used for any of the violations.

1. While § 940.20(1m) refers to the injunction statutes by number, the Committee concluded that the instruction would be more easily understood if it used the terms "domestic abuse injunction," "harassment injunction," or "tribal injunction filed under § 806.247(3)" to describe the injunction.

Note that child abuse injunctions under § 813.122 and vulnerable adult injunctions under § 813.123 are not covered by § 940.20(1m).

2. The Committee concluded that the simple "substantial factor" definition of cause should be sufficient for most cases. Where there is evidence of more than one possible cause, something like the following might be added:

> There may be more than one cause of bodily harm. The act of one person alone might produce it, or the acts of two or more persons might jointly produce it.

3. This is the definition of "bodily harm" provided in § 939.22(4).

4. Give additional instruction regarding the phrase "without consent" when the evidence warrants it. See § 939.22(48)(a)-(c).

5. The knowledge element is based on the definition of "intentionally" in § 939.23(3): ". . . the actor must have knowledge of those facts which are necessary to make his conduct criminal and which are set forth after the word intentionally."

6. See § 939.23(4) and Wis JI-Criminal 923A and 923B.

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1230 BATTERY TO A FIRE FIGHTER OR COMMISSION WARDEN — § 940.20(2)

Statutory Definition of the Crime

Section 940.20(2) of the Criminal Code of Wisconsin is violated by one who intentionally causes bodily harm to a (fire fighter) (commission warden) where at the time of the act the defendant knows or has reason to know that the victim is a (fire fighter) (commission warden) acting in an official capacity and there is no consent by the victim.

State's Burden of Proof

Before you may find the defendant guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following six elements were present.

1. The defendant caused bodily harm to (name of victim).

   "Cause" means that the defendant's conduct was a substantial factor in producing bodily harm.[1]

   "Bodily harm" means physical pain or injury, illness, or any impairment of physical condition.[2]

2. (Name of victim) was a (fire fighter)[3] (commission warden).[4]

3. (Name of victim) was acting in an official capacity.

   (Fire fighters) (Commission wardens) act in an official capacity when they perform duties that they are employed[5] to perform.[6] [The duties of a (fire fighter) (commission warden) include: _____.][7]

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4. The defendant knew or had reason to know that (name of victim) was a (fire fighter) (commission warden) acting in an official capacity.[8]

5. The defendant caused bodily harm to (name of victim) without the consent[9] of (name of victim).

6. The defendant acted intentionally. This requires that the defendant acted with the mental purpose to cause bodily harm to (name of victim) and knew that (name of victim) did not consent.[10]

Deciding About Intent and Knowledge

You cannot look into a person's mind to find intent or knowledge. Intent and knowledge must be found, if found at all, from the defendant's acts, words, and statements, if any, and from all the facts and circumstances in this case bearing upon intent and knowledge.

Jury's Decision

If you are satisfied beyond a reasonable doubt that all six elements of this offense have been proved, you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.

COMMENT

Wis JI-Criminal 1230 was originally published as Wis JI-Criminal 1225 in 1974 and renumbered Wis JI-Criminal 1230 in 1994. It was revised in 2005 and 2008. This revision was approved by the Committee in December 2015 to reflect changes made by 2015 Wisconsin Act 78.

Section 940.20(2) was amended by 2015 Wisconsin Act 78 [effective date: November 13, 2015]. "Law enforcement officer" was deleted and moved to § 940.203 which, as amended, applies to battery or threat to a judge, prosecutor, or law enforcement officer. See Wis JI-Criminal 1240C and 1240D for offenses involving battery and threat to prosecutors or law enforcement officers.

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1. The Committee concluded that the simple "substantial factor" definition of cause should be sufficient for most cases. Where there is evidence of more than one possible cause, something like the following might be added:

> There may be more than one cause of bodily harm. The act of one person alone might produce it, or the acts of two more persons might jointly produce it.

Also see Wis JI-Criminal 901, Cause.

2. This is the definition of "bodily harm" provided in § 939.22(4).

3. Section 940.20(2) provides that the definition of "fire fighter" in § 102.475(8)(b) applies:

> (b) "Fire fighter" means any person employed by the state or any political subdivision as a member or officer of a fire department or a member of a volunteer department, including the state fire marshal and deputies.

4. 2007 Wisconsin Act 27 [effective date: November 27, 2007] amended § 940.2(2) to include "commission warden" and created § 939.22(5) to define the term: "'Commission warden' means a conservation warden employed by the Great Lakes Indian Fish and Wildlife Commission."

5. "Employed" is used here in the general sense of being engaged in the performance of a duty.

6. The definition of "official capacity" is taken from Wis JI-Criminal 915. See the Comment to that instruction for further discussion.

7. The duties, powers, or responsibilities of some public officers, officials, and employees are set forth in the Wisconsin Statutes or Administrative Code. When that is the case, the Committee suggests using the sentence in brackets and describing the duties in the blank. The Committee has concluded that the jury may be informed of the law that declares what a person's official duties are without running the risk of directing a verdict on an element of the crime. It is still for the jury to determine whether the person was performing the duty in the particular case. But see, State v. Jensen, 2007 WI App 256, 306 Wis.2d 572, 743 N.W.2d 468; and, State v. Schultz, 2007 WI App 257, 306 Wis.2d 598, 743 N.W.2d 823.

8. The "knew or had reason to know" requirement is taken directly from § 940.20(2). It is treated as a separate element rather than being combined with the sixth element where knowledge of lack of consent is addressed. This is because the "reason to know" standard differs from the actual knowledge that is required when the word "intentionally" is used in a criminal statute. See § 939.23(3).

The instruction applies the "reason to know" standard to the victim's status as a law enforcement and to "acting in official capacity." The statute expressly applies "reason to know" only to status as a law enforcement officer. But the two requirements are so closely connected that the Committee concluded the same knowledge standard has to apply to each.

9. If definition of "without consent" is believed to be necessary, see Wis JI-Criminal 948 which provides an instruction based on the definition provided in § 939.22(48). That definition provides that "without consent" means "no consent in fact" or that consent was given because of fear, a claim of legal authority by the defendant, or misunderstanding.

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10. For further definition of "intentionally," including the alternative referring to being "aware that his or her conduct is practically certain to cause the result," see Wis JI-Criminal 923A and 923B.

The requirement that the defendant know there is no consent is based on the definition of "intentionally" in § 939.23(3): ". . . the actor must have knowledge of those facts which are necessary to make his conduct criminal and which are set forth after the word intentionally."

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1231 BATTERY TO A PROBATION, EXTENDED SUPERVISION AND PAROLE AGENT, COMMUNITY SUPERVISION AGENT, OR AN AFTERCARE AGENT — § 940.20(2m)

Statutory Definition of the Crime

Section 940.20(2m) of the Criminal Code of Wisconsin is violated by one who intentionally causes bodily harm to [a probation, extended supervision and parole agent] [a community supervision agent] [an aftercare agent] where at the time of the act the defendant knows or has reason to know that the victim is [a probation, extended supervision and parole agent] [a community supervision agent] [an aftercare agent] acting in an official capacity and there is no consent by the victim harmed.

State's Burden of Proof

Before you may find the defendant guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following six elements were present.

Elements of the Crime That the State Must Prove

1. The defendant caused bodily harm to (name of victim).

   "Cause" means that the defendant's conduct was a substantial factor in producing the bodily harm.[1]

   "Bodily harm" means physical pain or injury, illness, or any impairment of physical condition.[2]

2. (Name of victim) was [a probation, extended supervision and parole agent][3] [a community supervision agent][4] [an aftercare agent].[5]

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3. (Name of victim) was acting in an official capacity.

[Probation, extended supervision and parole agents] [community supervision agents] [aftercare agents] act in an official capacity when they perform duties that they are employed to perform.[6] [These duties include: _____.][7]

4. The defendant knew, or had reason to know, that (name of victim) was [a probation, extended supervision and parole agent] [a community supervision agent] [an aftercare agent] acting in an official capacity.[8]

5. (Name of victim) did not consent to the causing of bodily harm.

6. The defendant acted intentionally.

This requires that the defendant intended to cause bodily harm to (name of victim) and knew that (name of victim) did not consent to the causing of bodily harm.[9]

Meaning of "Intentionally"

Intent to cause bodily harm means that the defendant had the mental purpose to cause bodily harm to another human being or was aware that (his) (her) conduct was practically certain to cause bodily harm to another.[10]

Deciding About Intent and Knowledge

You cannot look into a person's mind to find intent or knowledge. Intent and knowledge must be found, if found at all, from the defendant's acts, words, and statements, if any, and from all the facts and circumstances in this case bearing upon intent and knowledge.

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Jury's Decision

If you are satisfied beyond a reasonable doubt that all six elements of this offense have been proved, you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.

COMMENT

Wis JI-Criminal 1231 was originally published in 1994 and revised in 1996, 2005, and 2008. This revision was approved by the Committee in April 2019; it added reference to extended supervision and community supervision agents.

Section 940.20(2m) was created by 1989 Wisconsin Act 336 and originally applied to battery of probation and parole agents. It was amended by 1995 Wisconsin Act 77 to include battery to "aftercare agents." [Effective date: July 1, 1996]. "Extended supervision agents" were added by 1997 Wisconsin Act 283. [Effective date: June 24, 1998]. 2015 Wisconsin Act 55 added "community supervision agents" [with a delayed effective date of September 24, 2017].

1. The Committee concluded that the simple "substantial factor" definition of cause should be sufficient for most cases. Where there is evidence of more than one possible cause, something like the following might be added:

> There may be more than one cause of bodily harm. The act of one person alone might produce it, or the acts of two or more persons might jointly produce it.

Also see Wis JI-Criminal 901 Cause.

2. This is the definition of "bodily harm" provided in § 939.22(4).

3. Section 940.20(2m)(a)2. provides that "'probation, extended supervision and parole agent' means any person authorized by the department of corrections to exercise control over a probationer, parolee, or person on extended supervision."

4. "Community supervision agent" is defined as follows in § 940.20(2m)(a)1m.: ". . . any person authorized by the department of corrections to exercise control over a juvenile on community supervision."

5. "Aftercare agent" is defined as follows in § 940.20(2m)(a)1.: ". . . any person authorized by the department of corrections to exercise control over a juvenile on aftercare."

6. The definition of "official capacity" is taken from Wis JI-Criminal 915. See the Comment to that instruction for further discussion.

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7. The duties, powers, or responsibilities of some public officers, officials, and employees are set forth in the Wisconsin Statutes or Administrative Code. When that is the case, the Committee suggests using the sentence in brackets and describing the duties in the blank. The Committee has concluded that the jury may be informed of the law that declares what a person's official duties are without running the risk of directing a verdict on an element of the crime. It is still for the jury to determine whether the person was performing the duty in the particular case. But see, State v. Jensen, 2007 WI App 256, 306 Wis.2d 572, 743 N.W.2d 468; and, State v. Schultz, 2007 WI App 257, 306 Wis.2d 598, 743 N.W.2d 823.

Wisconsin Administrative Code, Chapter DOC 328, Community Supervision Of Offenders, provides "rules, services, and programs for offenders who are under the supervision of the department." DOC 328.04(2) extensively describes the duties of agents who provide community supervision. All the agents specified in § 940.20(2m) must be "authorized by the department to exercise control" over specific categories of persons who are being supervised. See the definitions quoted in footnotes 3, 4, and 5 above. Thus, it appears that all would be subject to the standards and grants of authority in DOC 328.

8. The "knew or had reason to know" requirement is taken directly from § 940.20(2m). It is treated as a separate element rather than being combined with the sixth element where knowledge of lack of consent is addressed. This is because the "reason to know" standard differs from the actual knowledge that is required when the word "intentionally" is used in a criminal statute. See § 939.23(3).

The instruction applies the "reason to know" standard to the victim's status as a probation or parole officer and to "acting in official capacity." The statute expressly applies "reason to know" only to status as a probation or parole officer. But the two requirements are so closely connected that the Committee concluded the same knowledge standard has to apply to each.

9. Knowledge that the victim was acting in an official capacity and that the victim did not consent is required because the word "intentionally" is used in the statute. That requires not only intent to cause bodily harm but also "knowledge of those facts necessary to make his or her conduct criminal and which are set forth after the word 'intentionally'." § 939.23(3).

10. See § 939.23(4) and Wis JI-Criminal 923A and 923B.

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1232 BATTERY TO JUROR [JUROR HAS ASSENTED TO VERDICT] — § 940.20(3)

Statutory Definition of the Crime

Battery to a juror, as defined in § 940.20(3) of the Criminal Code of Wisconsin, is committed by one who intentionally causes bodily harm to a person without the consent of that person because the person assented to a (verdict) (indictment).

State's Burden of Proof

Before you may find the defendant guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following five elements were present.

Elements of the Crime That the State Must Prove

1. The defendant caused bodily harm to (name of victim).

   "Cause" means that the defendant's conduct was a substantial factor in producing the bodily harm.[1]

   "Bodily harm" means physical pain or injury, illness, or any impairment of physical condition.[2]

2. The defendant intended to cause bodily harm to (name of victim).

   The phrase "intent to cause bodily harm" means that the defendant had the mental purpose to cause bodily harm to another human being or was aware that his conduct was practically certain to cause bodily harm to another.[3]

3. The defendant caused bodily harm without the consent of (name of victim).

4. The defendant knew that (name of victim) did not consent to the causing of bodily harm.[4]

5. The defendant caused such bodily harm to (name of victim) because (name of victim) assented to a (verdict) (indictment).

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Deciding About Intent and Knowledge

You cannot look into a person's mind to find intent or knowledge. Intent and knowledge must be found, if found at all, from the defendant's acts, words, and statements, if any, and from all the facts and circumstances in this case bearing upon intent and knowledge.[5]

Jury's Decision

If you are satisfied beyond a reasonable doubt that all five elements of this offense have been proved, you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.

COMMENT

The offense covered by this instruction was formerly covered by Wis JI-Criminal 1224 which was originally published in 1979 and revised in 1982 and 1992. It was republished as Wis JI-Criminal 1232 in 1994 and revised in 1998. This revision was approved by the Committee in October 2004.

Section 940.20(3) was amended by 1997 Wisconsin Act 143 (effective date: May 5, 1998) to delete reference to "witnesses," limiting the coverage of the statute to offenses against grand and petit jurors. Offenses against witnesses are addressed by § 940.201, also created by Act 143. See Wis JI-Criminal 1238 and 1239.

1. The Committee concluded that the simple "substantial factor" definition of cause should be sufficient for most cases. Where there is evidence of more than one possible cause, something like the following might be added:

> There may be more than one cause of bodily harm. The act of one person alone might produce it, or the acts of two or more persons might jointly produce it.

2. This is the definition of "bodily harm" provided in § 939.22(4).

3. See § 939.23(4) and Wis JI-Criminal 923A and 923B.

4. The knowledge element is based on the definition of "intentionally" in § 939.23(3): ". . . the actor must have knowledge of those facts which are necessary to make his conduct criminal and which are set forth after the word intentionally."

5. This instruction on finding intent is a shorter version of a longer statement commonly used in the standard instructions. The Committee has concluded that this shorter version is appropriate for most cases. The complete, traditional, statement is found at Wis JI-Criminal 923A.

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1233 BATTERY TO WITNESS [WITNESS LIKELY TO BE CALLED TO TESTIFY]

[INSTRUCTION WITHDRAWN]

COMMENT

Wis JI-Criminal 1233 was originally published as Wis JI-Criminal 1224A in 1979. It was republished as Wis JI-Criminal 1233 in 1994. It was withdrawn by the Committee in August 1998 after § 940.20(3) was revised to delete reference to "witnesses." Battery or threat to witness is now covered by § 940.201; see Wis JI-Criminal 1238.

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1234 BATTERY TO A PUBLIC OFFICER — § 940.20(4)

Statutory Definition of the Crime

Battery to a public officer, as defined in § 940.20(4) of the Criminal Code of Wisconsin, is committed by one who intentionally causes bodily harm to a public officer, without the consent of that person, in order to influence the action of the officer or as a result of any action taken within the officer's official capacity.

State's Burden of Proof

Before you may find the defendant guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following six elements were present.

Elements of the Crime That the State Must Prove

1. (Name of victim) was a public officer at the time of the alleged offense.

   "Public officer" means any person appointed or elected according to law to discharge a public duty for the state or one of its subordinate governmental units.[1]

   (A _____ is a public officer.)[2]

2. The defendant caused bodily harm to (name of victim).

   "Cause" means that the defendant's conduct was a substantial factor in producing the bodily harm.[3]

   "Bodily harm" means physical pain or injury, illness, or any impairment of physical condition.[4]

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3. The defendant intended to cause such bodily harm.

The phrase "intent to cause bodily harm" means that the defendant had the mental purpose to cause bodily harm to another human being or was aware that his conduct was practically certain to cause bodily harm to another.[5]

4. (Name of victim) did not consent to such bodily harm.

5. The defendant knew (name of victim) did not consent.[6]

6. The defendant caused bodily harm to (name of victim) (in order to influence the official action of (name of victim)) (as a result of action taken within (name of victim)'s official capacity).[7]

Deciding About Intent and Knowledge

You cannot look into a person's mind to find intent or knowledge. Intent and knowledge must be found, if found at all, from the defendant's acts, words, and statements, if any, and from all the facts and circumstances in this case bearing upon intent and knowledge.

Jury's Decision

If you are satisfied beyond a reasonable doubt that all six elements of this offense have been proved, you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.

COMMENT

The offense covered by this instruction was formerly covered by Wis JI-Criminal 1226 which was originally published in 1978 and revised in 1992. It was republished as Wis JI-Criminal 1234 in 1994 and

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revised in 2004. This revision was approved by the Committee in February 2008; it involved minor revisions to footnotes.

The offense of battery to a public officer, as defined in § 940.20(4), was created by Chapter 173, Laws of 1977.

1. This definition of "public officer" is found in § 939.22(30).

2. Where a statute provides that a person holding a particular position is a public officer, the Committee believes the jury may be told of that fact. It is still for the jury to be satisfied that the victim did hold such a position.

3. The Committee concluded that the simple "substantial factor" definition of cause should be sufficient for most cases. Where there is evidence of more than one possible cause, something like the following might be added:

> There may be more than one cause of bodily harm. The act of one person alone might produce it, or the acts of two or more persons might jointly produce it.

4. This is the definition of "bodily harm" provided in § 939.22(4).

5. See § 939.23(4) and Wis JI-Criminal 923A and 923B.

6. The knowledge element is based on the definition of "intentionally" in § 939.23(3): ". . . the actor must have knowledge of those facts which are necessary to make his or her conduct criminal and which are set forth after the word 'intentionally'."

7. For definition of "official capacity," see Wis JI-Criminal 915.

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1235 BATTERY TO A TECHNICAL COLLEGE DISTRICT OR SCHOOL DISTRICT OFFICER OR EMPLOYEE — § 940.20(5)

Statutory Definition of the Crime

Section 940.20(5) of the Criminal Code of Wisconsin is violated by one who intentionally causes bodily harm to a school district officer or employee[1] where at the time of the act the defendant knows or has reason to know that the victim is a school district officer or employee acting in that capacity and there is no consent by the victim harmed.

State's Burden of Proof

Before you may find the defendant guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following six elements were present.

Elements of the Crime That the State Must Prove

1. The defendant caused bodily harm to (name of victim).

   "Cause" means that the defendant's conduct was a substantial factor in producing the bodily harm.[2]

   "Bodily harm" means physical pain or injury, illness, or any impairment of physical condition.[3]

2. (Name of victim) was a school district (officer) (employee).[4]

3. (Name of victim) was acting in the capacity of a school district (officer) (employee).[5]

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This means the (officer) (employee) was performing duties that (he) (she) was employed[6] to perform.[7]

4. The defendant knew, or had reason to know, that (name of victim) was a school district (officer) (employee) acting in the capacity of a school district (officer) (employee).[8]

5. (Name of victim) did not consent to the causing of bodily harm.

6. The defendant acted intentionally.

This requires that the defendant intended to cause bodily harm to (name of victim) and knew that (name of victim) did not consent to the causing of bodily harm.[9]

Intent to cause bodily harm means that the defendant had the mental purpose to cause bodily harm to another human being or was aware that his conduct was practically certain to cause bodily harm to another.[10]

Jury's Decision

If you are satisfied beyond a reasonable doubt that all six elements of this offense have been proved, you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.

COMMENT

Wis JI-Criminal 1235 was originally published in 1994 and revised in 2004. This revision was approved by the Committee in February 2008; it revised the definition of "capacity."

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Section 940.20(5) was created by 1993 Wisconsin Act 54 (effective date: November 30, 1993).

1. The instruction is drafted for a case involving a "school district officer or employee." The statute also applies to offenses against "technical college district officers or employees." For that case, the instruction would have to be changed to refer to the appropriate type of victim.

2. The Committee concluded that the simple "substantial factor" definition of cause should be sufficient for most cases. Where there is evidence of more than one possible cause, something like the following might be added:

> There may be more than one cause of bodily harm. The act of one person alone might produce it, or the acts of two or more persons might jointly produce it.

3. This is the definition of "bodily harm" provided in § 939.22(4).

4. Section 940.20(5)(a)1 provides that "school district" has the meaning given in § 115.01(3). That definition reads as follows:

> (3) School Districts. The school district is the territorial unit for school administration. School districts are classified as common, union high, unified and 1st class city school districts. A joint school district is one the territory of which is not wholly in one municipality.

Section 940.20(5)(a)2. Provides that "'technical college district' means a district established under ch. 38."

5. The appropriate alternative should be selected. The Committee concluded that "officer" refers to an appointed or elected position, such as school board member, while "employee" refers to anyone who is paid by the district for performing functions on behalf of the district. See § 939.22(30) for similar distinctions between the terms "public officer" and "public employee."

6. "Employed" is used here in the general sense of being engaged or involved in performing a duty or service. The statute applies to both officer and employees, the former being elected or appointed. See note 5, supra. If the use of "employed" is thought to be confusing if used to refer to "officers," "elected" or "appointed" could be substituted.

7. Unlike statutes dealing with closely related offenses (see subsec. (2), (2m), and (4) of § 940.20), § 940.20(5) refers not to "in an official capacity" but to "acting in that capacity." In defining this element, the Committee concluded that it was appropriate to define the term as "official capacity" is defined for the closely related offenses. The definition is taken from Wis JI-Criminal 915. See the Comment to that instruction for further discussion.

8. The "knew or had reason to know" requirement is taken directly from § 940.20(5)(b). It is treated as a separate element rather than being combined with the sixth element where knowledge of lack of consent is addressed. This is because the "reason to know" standard differs from the actual knowledge that is required when the word "intentionally" is used in a criminal statute. See § 939.23(3).

The instruction applies the "reason to know" standard to the victim's status as a school district officer or employee and to "acting in that capacity." The statute expressly applies "reason to know" only to status

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as an officer or employee. But the two requirements are so closely connected that the Committee concluded the same knowledge standard has to apply to each.

9. Knowledge that the victim was acting in an official capacity and that the victim did not consent is required because the word "intentionally" is used in the statute. That requires not only intent to cause bodily harm but also "knowledge of those facts necessary to make his or her conduct criminal and which are set forth after the word 'intentionally'." § 939.23(3).

10. See § 939.23(4) and Wis JI-Criminal 923A and 923B.

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1236 BATTERY TO A PUBLIC TRANSIT VEHICLE OPERATOR OR PASSENGER — § 940.20(6)

Statutory Definition of the Crime

Section 940.20(6) is violated by one who intentionally causes bodily harm to a public transit vehicle operator or passenger.[1]

State's Burden of Proof

Before you may find the defendant guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following three elements were present.

Elements of the Crime That the State Must Prove

1. The defendant caused bodily harm to (name of victim).

   "Cause means that the defendant's conduct was a substantial factor in producing the bodily harm.[2]

   "Bodily harm" means physical pain or injury, illness, or any impairment of physical condition.[3]

2. (Name of victim) was a public transit vehicle (operator) (passenger).

   "Public transit vehicle" means any vehicle used for providing transportation service to the general public.[4]

3. The defendant acted intentionally.

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This requires that the defendant intended to cause bodily harm to (name of victim) and knew that (name of victim) was a public transit vehicle (operator) (passenger).[5]

Intent to cause bodily harm means that the defendant had the mental purpose to cause bodily harm to another human being or was aware that his conduct was practically certain to cause bodily harm to another.[6]

Jury's Decision

If you are satisfied beyond a reasonable doubt that all three elements of this offense have been proved, you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.

COMMENT

Wis JI-Criminal 1236 was originally published in 1994 and revised in 2005. This revision corrected a typographical error; it was approved by the Committee in April 2014.

The offense defined in § 940.20(6) was created by 1993 Wisconsin Act 164 (effective date: April 2, 1994). [This statute was originally created as sub. (5) of § 940.20; it was changed to sub. (6) by a later revisor's bill, 1993 Wisconsin Act 491.]

1. This instruction deals with an offense under § 940.20(6)(b)1. That subsection applies to harm that "occurs while the victim is an operator, a driver, or a passenger of, in or on a public transit vehicle." The instruction refers only to "operator or passenger"; the Committee concluded that "operator" includes "driver." Other classes of victims are covered by (b)2. and 3:

> 2. The harm occurs after the offender forces or directs the victim to leave a public transit vehicle.
>
> 3. The harm occurs as the offender prevents, or attempts to prevent the victim from gaining lawful access to a public transit vehicle.

2. The Committee concluded that the simple "substantial factor" definition of cause should be sufficient for most cases. Where there is evidence of more than one possible cause, something like the following might be added:

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There may be more than one cause of bodily harm. The act of one person alone might produce it, or the acts of two or more persons might jointly produce it.

3. This is the definition of "bodily harm" provided in § 939.22(4).

4. This is the definition provided in § 940.20(6)(a).

5. Knowledge that the victim was an operator or passenger is required because the word "intentionally" is used in the statute. That requires not only intent to cause bodily harm but also "knowledge of those facts necessary to make his or her conduct criminal and which are set forth after the word "intentionally." § 939.23(3).

6. See § 939.23(3). Wis JI-Criminal 923A and 923B provide additional definition of "intentionally" which may be incorporated here if felt to be necessary.

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1237 BATTERY TO AN EMERGENCY MEDICAL CARE PROVIDER[1] — § 940.20(7)

Statutory Definition of the Crime

Section 940.20(7) of the Criminal Code of Wisconsin is violated by one who intentionally causes bodily harm to an (identify appropriate category for the victim),[2] where at the time of the act the defendant knows or has reason to know that the victim is an (identify appropriate category for the victim) acting in an official capacity and there is no consent of the victim harmed.

State's Burden of Proof

Before you may find the defendant guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following six elements were present.

Elements of the Crime That the State Must Prove

1. The defendant caused bodily harm to (name of victim).

   "Cause" means that the defendant's conduct was a substantial factor in producing the bodily harm.[3]

   "Bodily harm" means physical pain or injury, illness, or any impairment of physical condition.[4]

2. (Name of victim) was an (identify appropriate category for the victim). [A _____ is (identify appropriate category for the victim).][5]

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3. (Name of victim) was acting in an official capacity.

This means (name of victim) was performing duties that (he) (she) was employed[6] to perform.[7] [The duties of a _____ include: _____.][8]

4. The defendant knew, or had reason to know, that (name of victim) was acting in an official capacity.[9]

5. (Name of victim) did not consent to the causing of bodily harm.

6. The defendant acted intentionally.

This requires that the defendant intended to cause bodily harm to (name of victim) and knew that (name of victim) did not consent to the causing of bodily harm.[10]

Intent to cause bodily harm means that the defendant had the mental purpose to cause bodily harm to another human being or was aware that his conduct was practically certain to cause bodily harm to another.[11]

Deciding About Intent and Knowledge

You cannot look into a person's mind to find intent or knowledge. Intent and knowledge must be found, if found at all, from the defendant's acts, words, and statements, if any, and from all the facts and circumstances in this case bearing upon intent and knowledge.[12]

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Jury's Decision

If you are satisfied beyond a reasonable doubt that all six elements of this offense have been proved, you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.

COMMENT

Wis JI-Criminal 1237 was originally published in 1996 and revised in 2004 and 2008. This revision was approved by the Committee in December 2017; it reflects changes in terminology made by 2017 Wisconsin Act 12.

Section 940.20(7) was created by 1995 Wisconsin Act 145 (effective date: March 20, 1996).

2017 Wisconsin Act 12 [effective date: June 23, 2017] changed the terminology used in the statute from "emergency medical technician" to "emergency medical services practitioner" and from "first responder" to "emergency medical responder."

1. The statute applies to four different categories of persons; for each category, the statute provides a full or partial definition. The instruction provides a blank where it is necessary to identify the category applicable to the victim. The category is to be defined, if necessary, in the second element.

2. Identify the appropriate category for the victim in this blank and the other blanks in the instruction: emergency department worker; emergency medical services practitioner; emergency medical responder; or ambulance driver. The terms will be defined, if necessary, in the second element.

3. The Committee concluded that the simple "substantial factor" definition of cause should be sufficient for most cases. Where there is evidence of more than one possible cause, something like the following might be added:

> There may be more than one cause of bodily harm. The act of one person alone might produce it, or the acts of two or more persons might jointly produce it.

4. This is the definition of "bodily harm" provided in § 939.22(4).

5. If it is believed to be necessary, provide a definition for the type of victim involved. For "emergency department worker," see § 940.20(7)(a)2. For "emergency medical services practitioner," § 940.20(7)(a)2g provides that the definition in § 256.01(5) applies. For "emergency medical responder," § 940.20(7)(a)2d provides that the definition in § 256.01(4p) applies. For "ambulance driver" § 940.20(7)(a)1e provides that the definition of "ambulance" in § 256.01(1t) applies.

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6. "Employed" is used here in the general sense of being engaged or involved in performing a duty or service.

7. The definition of "official capacity" is taken from Wis JI-Criminal 915. See the Comment to that instruction for further discussion.

8. The duties, powers, or responsibilities of some public officers, officials, and employees are set forth in the Wisconsin Statutes or Administrative Code. When that is the case, the Committee suggests using the sentence in brackets and describing the duties in the blank. The Committee has concluded that the jury may be informed of the law that declares what a person's official duties are without running the risk of directing a verdict on an element of the crime. It is still for the jury to determine whether the person was performing the duty in the particular case. But see, State v. Jensen, 2007 WI App 256, 306 Wis.2d 572, 743 N.W.2d 468; and, State v. Schultz, 2007 WI App 257, 306 Wis.2d 598, 743 N.W.2d 823.

9. The "knew or had reason to know" requirement is taken directly from § 940.20(7)(b). It is treated as a separate element rather than being combined with the sixth element where knowledge of lack of consent is addressed. This is because the "reason to know" standard differs from the actual knowledge that is required when the word "intentionally" is used in a criminal statute. See § 939.23(3).

The instruction applies the "reason to know" standard to the victim's status as an emergency medical care provider and to "acting in an official capacity." The statute expressly applies "reason to know" only to status as an officer or employee. But the two requirements are so closely connected that the Committee concluded the same knowledge standard has to apply to each.

10. Knowledge that the victim was acting in an official capacity and that the victim did not consent is required because the word "intentionally" is used in the statute. That requires not only intent to cause bodily harm but also "knowledge of those facts necessary to make his or her conduct criminal and which are set forth after the word 'intentionally'." § 939.23(3).

11. See § 939.23(4) and Wis JI-Criminal 923A and 923B.

12. This instruction on finding intent is a shorter version of a longer statement commonly used in the standard instructions. The Committee has concluded that this shorter version is appropriate for most cases. The complete, traditional, statement is found at Wis JI-Criminal 923A.

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1238 BATTERY OR THREAT TO A WITNESS [WITNESS HAS ATTENDED OR TESTIFIED] — §940.201

Statutory Definition of the Crime

Section 940.201 of the Criminal Code of Wisconsin is violated by one who intentionally (causes) (threatens to cause) bodily harm to a person who he or she knows or has reason to know is or was a witness by reason of the person having attended or testified as a witness and without the consent of the person harmed or threatened.

State's Burden of Proof

Before you may find the defendant guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following six elements were present.

Elements of the Crime That the State Must Prove

1. The defendant (caused) (threatened to cause) bodily harm to (name of victim).

"Bodily harm" means physical pain or injury, illness, or any impairment of physical condition.[1]

IF THE CASE INVOLVES CAUSING BODILY HARM, ADD THE FOLLOWING:

["Cause" means that the defendant's conduct was a substantial factor in producing bodily harm.][2]

IF THE CASE INVOLVES A THREAT, ADD THE FOLLOWING:

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[A "threat" is an expression of intention to do harm and may be communicated orally, in writing, or by conduct. This element requires a true threat. "True threat" means that a reasonable person making the threat would foresee that a reasonable person would interpret the threat as a serious expression of intent to do harm. It is not necessary that the person making the threat have the ability to carry out the threat. You must consider all the circumstances in determining whether a threat is a true threat.][3]

2. (Name of victim) was a witness.

["Witness" means any person who has attended a proceeding to testify or who has testified.][4]

[A [insert proper term from the definition in § 940.41(3)] is a witness.]

3. The defendant knew [or had reason to know][5] that (name of victim) was a witness.

4. The defendant (caused) (threatened to cause) bodily harm to (name of victim) because[6] the person attended or testified as a witness.

5. The defendant (caused) (threatened) bodily harm without the consent[7] of (name of victim).

6. The defendant acted intentionally. This requires that the defendant acted with the mental purpose[8] to (cause) (threaten) bodily harm to (name of victim) and knew that (name of victim) did not consent.[9]

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Deciding About Intent and Knowledge

You cannot look into a person's mind to find intent or knowledge. Intent and knowledge must be found, if found at all, from the defendant's acts, words, and statements, if any, and from all the facts and circumstances in this case bearing upon intent and knowledge.

Jury's Decision

If you are satisfied beyond a reasonable doubt that all six elements of this offense have been proved, you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.

COMMENT

Wis JI-Criminal 1238 was originally published 1998. This revision was approved by the Committee in April 2004; it involved adoption of a new format, adding a definition of "true threat," and nonsubstantive changes in the text.

In 1998, this instruction replaced Wis JI-Criminal 1232 for offenses against witnesses. Wis JI-Criminal 1232 has been revised to apply only to battery against a juror.

This instruction is for violations of § 940.201(2)(a), where the alleged battery has taken place after the victim has testified or attended as a witness. In State v. McLeod, 85 Wis.2d 787, 271 N.W.2d 157 (Ct. App. 1978), the Wisconsin Court of Appeals held that the battery to witness statute also applies where the victim has not yet testified but is expected to be called. For that type of case, the second and fourth elements must be modified. See footnotes 4 and 6, below. Wis JI-Criminal 1239, which formerly provided a separate instruction for that type of case, has been withdrawn. [The withdrawal note for Wis JI-Criminal 1239 contains a summary of McLeod.

Section 940.201 was created by 1997 Wisconsin Act 143, effective date: May 5, 1998. Similar offenses against witnesses were formerly addressed by § 943.20(3). Act 143 expanded the scope of the statute by including threats to cause bodily harm and, in sub. (2)(b), threats to cause and causing of bodily harm against family members of a witness. If threat or harm to a family member of a witness is involved, the instruction must be modified.

1. This is the definition of "bodily harm" provided in § 939.22(4).

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2. The Committee concluded that the simple "substantial factor" definition of cause should be sufficient for most cases. Where there is evidence of more than one possible cause, something like the following might be added:

> There may be more than one cause of bodily harm. The act of one person alone might produce it, or the acts of two more persons might jointly produce it.

Also see Wis JI-Criminal 901, Cause.

3. This definition is based on one of the descriptions of "true threat" in State v. Perkins, 2001 WI 46, ¶28, 243 Wis.2d 141, 626 N.W.2d 762. Perkins held that a jury instruction for a threat to a judge in violation of § 940.203 was an incomplete statement of the law because it did not define "threat" as "true threat." This created an unacceptable risk that "the jury may have used the common definition of 'threat,' thereby violating the defendant's constitutional right to freedom of speech." 2001 WI 46, ¶43. The court stated: "The common definition of threat is an expression of an intention to inflict injury on another. The definition of threat for the purposes of a statute criminalizing threatening language is much narrower." 2001 WI 46, ¶43.

The following is the most complete definition of "true threat" offered by the court in Perkins:

> A true threat is a statement that a speaker would reasonably foresee that a listener would reasonably interpret as a serious expression of a purpose to inflict harm, as distinguished from hyperbole, jest, innocuous talk, expressions of political views, or other similarly protected speech. It is not necessary that the speaker have the ability to carry out the threat. In determining whether a statement is a true threat, the totality of the circumstances must be considered. 2001 WI 46, ¶29.

The Committee concluded that the definition in the instruction is equivalent in content and will be more understandable to the jury. In a case decided at the same time as Perkins, the court used a definition much like the one used in the instruction. See State v. A.S., 2001 WI 48, ¶23, 243 Wis.2d 173, 626 N.W.2d 712.

Perkins involved an orally communicated threat. The instruction is drafted more broadly to be applicable whether the threat is communicated orally, in writing, or by conduct.

4. The definition of "witness" in the first set of brackets is a simplified version of the definition provided in § 940.41(3), which applies to violations of § 940.201. If that statement does not fit the status of the victim, the definition in the second set of brackets should be used, selecting the proper alternative from the full definition, which reads as follows:

> (3) "Witness" means any natural person who has been or is expected to be summoned to testify; who by reason of having relevant information is subject to call or likely to be called as a witness, whether or not any action or proceeding has as yet been commenced; whose declaration under oath is received as evidence for any purpose; who has provided information concerning any crime to any peace officer or prosecutor; who provided information concerning a crime to any employee or agent of a law enforcement agency using a crime reporting telephone hotline or other telephone number provided by the law enforcement agency; or who has been served with a subpoena issued under § 885.01 or under the authority of any court of this state or of the United States.

In State v. McLeod, 85 Wis.2d 787, 271 N.W.2d 157 (Ct. App. 1978), the Wisconsin Court of Appeals

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held that the predecessor to § 943.201 – § 940.26, 1975 Wis. Stats. – also applied where the victim has not yet attended or testified but is expected to be summoned to testify. For that type of case, the definition of "witness" in the second element should be modified to refer to "a person who is expected to be summoned to testify."

5. The statute includes the requirement that the defendant "knew or had reason to know" that the victim is or was a witness. A strong argument can be made that making an element of this statement is unnecessary because of the element that follows. That is, if the defendant committed the battery against the victim because the victim had testified, the defendant must have known that the victim was a witness. However, because the "knew or had reason to know" requirement is part of the statute, the Committee concluded that it should be retained as an element. In all cases that the Committee could envision, the defendant who caused harm to another person "by reason of" that person having testified would have known that person was a witness. Thus, the "had reason to know" alternative is placed in brackets because it is not expected to be applicable to the typical case under the statute.

6. This element is drafted for a case where the person has attended or testified. If that statement does not fit the status of the victim, the statement must be modified. See note 4, supra.

The instruction uses "because" in place of the statutory language "by reason of . . ." The Committee intended no substantive change and believed the instruction will be easier for a jury to understand if "because" is used.

7. If definition of "without consent" is believed to be necessary, see Wis JI-Criminal 948 which provides an instruction based on the definition provided in § 939.22(48). That definition provides that "without consent" means "no consent in fact" or that consent was given because of fear, a claim of legal authority by the defendant, or misunderstanding.

8. For further definition of "intentionally", including the alternative referring to being "aware that his or her conduct is practically certain to cause the result," see Wis JI-Criminal 923A and 923B.

9. The requirement that the defendant know there is no consent is based on the definition of "intentionally" in § 939.23(3): ". . . the actor must have knowledge of those facts which are necessary to make his conduct criminal and which are set forth after the word intentionally."

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1239 BATTERY OR THREAT TO WITNESS [WITNESS LIKELY TO BE CALLED TO TESTIFY] — § 940.201

[INSTRUCTION WITHDRAWN]

COMMENT

Wis JI-Criminal 1239 was originally published 1998, replacing Wis JI-Criminal 1233 for offenses against persons who have not yet testified as a witness but are likely to do so. It was withdrawn in 2003 because the Committee concluded that an offense of that type could be addressed by making relatively minor adjustments in Wis JI-Criminal 1238.

The separate instruction formerly provided by Wis JI-Criminal 1239 addressed the type of violation recognized by the Wisconsin Court of Appeals in McLeod v. State, 85 Wis.2d 787, 271 N.W.2d 157 (Ct. App. 1978). McLeod held that the predecessor to § 940.201 applied to a battery against a person who had not yet attended or testified as a witness, but who was expected to do so. McLeod dealt with § 940.206, 1975 Wis. Stats., which was renumbered § 940.20(3) without substantive change by Chapter 173, Laws of 1977. Current § 940.201 replaced § 940.20(3) in 1998.

McLeod dealt with the conflict between the definition of the crime, which refers to "by reason of having attended or testified," and the reference in the definition of "witness" which includes anyone who "is expected to be summoned to testify" or who is "likely to be called as a witness, whether or not any action has as yet been commenced." (As described above, the definition of "witness" in § 940.41(3) now applies. However, the McLeod issue remains the same under the new definition.) In McLeod, the Wisconsin Court of Appeals determined that the statute applies to batteries upon witnesses who have not testified:

> Despite this clear and precise definition of who is a "witness" and protected by this battery-to-a-witness statute, it is here contended that a person who has not already testified from the witness stand is not protected by this statute. Reliance for this contention is based upon a phrase in the sentence in the battery-to-a-witness statute requiring the assault to be "with intent to cause bodily harm to that person [a witness as defined in § 943.30(3)(b)]." As to such intent, the statute states that is to be "by reason of his [the witness] having attended or testified as a witness . . . ." Does this use of the past tense operate to replace or alter the definition of "witness," carefully spelled out in the earlier part of the same section of the same statute? We think not. It is true that the legislature, in its rules of construction of statutes, has prescribed that "[t]he present tense of a verb includes the future when applicable," but not that the past tense include the future. However, in such construction-of-laws statute, the legislature has provided its rules shall be observed "unless construction in accordance with a rule would produce a result inconsistent with the manifest intent of the legislature. . . ." In the statute before us here, the manifest intent of the legislature is spelled out by the definition of "witness" to include persons expected to be

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> summoned to testify in the future. The reference to intent to harm "by reason of" the victim having testified, we hold, includes an assault intended to prevent the consequences of the victim having testified as well as to punish such witness for testimony already given. Our state Supreme Court has said that "the meaning of a word takes color and expression from the purport of the entire phrase of which it is a part, and it must be construed to harmonize with the context as a whole." Here, dealing with a single sentence statute, with a clear definition by incorporation of who is to be protected by the statute, we hold that "by reason of" reference to include the attacker's fear of future, as well as past consequences, to the attacker of the witness, "having attended or testified as a witness . . . ." No other construction of the "by reason of" reference harmonizes with or carries out the manifest and expressed purpose of the battery-to-a-witness statutes. [footnotes omitted, 85 Wis.2d 787, 791-92]

In cases like McLeod, even though the witness has not testified, there must be a connection between the battery and the victim's status as a witness, and the instruction so requires.

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1240 BATTERY OR THREAT TO JUDGE — § 940.203

INSTRUCTION WITHDRAWN

COMMENT

Wis JI-Criminal 1240 was originally published in 1994 and withdrawn in 2002 when it was divided into two versions: Wis JI-Criminal 1240A, Battery To Judge, and Wis JI-Criminal 1240B, Threat To Judge.

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1240A BATTERY TO A JUDGE — § 940.203(2)

Statutory Definition of the Crime

Section 940.203 of the Criminal Code of Wisconsin is violated by one who intentionally causes bodily harm to the (person) (family member) of any judge where at the time of the act the person knows[1] that the victim is a (judge) (family member of a judge), the act is in response to an action taken in the judge's official capacity,[2] and there is no consent by the person harmed.

State's Burden of Proof

Before you may find the defendant guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following six elements were present.

Elements of the Crime That the State Must Prove

1. The defendant caused bodily harm to (name of victim).

   "Cause" means that the defendant's conduct was a substantial factor in producing bodily harm.[3]

   "Bodily harm" means physical pain or injury, illness, or any impairment of physical condition.[4]

2. (Name of victim) was a (judge) (family member of a judge).

   [For the purpose of this offense, a (e.g., circuit court judge) is a judge.][5]

   [For the purpose of this offense, a (e.g., child) is a family member.][6]

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3. The defendant knew[7] that (name of victim) was a (judge) (family member of a judge).

4. The defendant caused bodily harm in response to an action taken in the judge's official capacity.

   Judges act in an official capacity when they perform duties that they are employed[8] to perform.[9] [The duties of a judge include: _____].[10]

5. The defendant caused bodily harm to (name of victim) without the consent[11] of (name of victim).

6. The defendant acted intentionally. This requires that the defendant acted with the mental purpose to cause bodily harm to (name of victim).[12]

Deciding About Intent and Knowledge

You cannot look into a person's mind to find intent or knowledge. Intent and knowledge must be found, if found at all, from the defendant's acts, words, and statements, if any, and from all the facts and circumstances in this case bearing upon intent and knowledge.

Jury's Decision

If you are satisfied beyond a reasonable doubt that all six elements of this offense have been proved, you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.

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COMMENT

Wis JI-Criminal 1240A was originally published in 1994. The 2002 revision divided the single instruction into two instructions, WI JI-Criminal 1240A and 1240B. Wis JI-Criminal 1240A was revised in 2008 to change the definition of "official capacity." The 2016 revision updated the Comment to reflect changes made by the 2015 Wisconsin Act 78. The 2018 revision reflected changes made by 2017 Wisconsin Act 272 [effective date: April 13, 2018] and 2017 Wisconsin Act 352 [effective date: April 18, 2018]. This instruction was revised in 2019 to correct a typographical error in element one.

Section 940.203 was created by 1993 Wisconsin Act 50 [effective date: November 25, 1993] and originally applied only to the offenses against judges and their family members. It was amended by 2015 Wisconsin Act 78 [effective date: November 13, 2015] to add prosecutors and law enforcement officers. Section 940.203 was amended again by 2017 Wisconsin Act 272 to include officers of the court. This instruction is drafted for violations under § 940.203 involving battery to a judge; for violations based on threats to a judge, see Wis JI-Criminal 1240B. For battery and threats to prosecutors and law enforcement officers, see Wis JI-Criminal 1240C and 1240D. For battery and threats to a current or former guardian ad litem, corporation counsel, or attorney, see Wis JI-Criminal 1241A and 1241B.

1. Neither the summary of the offenses here nor the third element contain the alternative "or should have known" found as part of the offense definition in sec. 940.203(2)(a). The Committee believed the phrase would be inapplicable in virtually all cases because a connection is required between the act or threat and the prosecutor's or law enforcement officer's official capacity. That is, the act or threat must be committed in response to an action taken in the person's official capacity. Therefore, it may be confusing to instruct the jury on the "should have known" alternative. Of course, if that alternative fits the facts of the case, it should be added to the instruction.

2. 2015 Wisconsin Act 109 amended § 940.203 to delete what was previously an alternative for this aspect of the offense definition: "… the judge is acting in an official capacity at the time of the act or threat…"

3. The Committee concluded that the simple "substantial factor" definition of cause should be sufficient for most cases. Where there is evidence of more than one possible cause, something like the following might be added:

> There may be more than one cause of bodily harm. The act of one person alone might produce it, or the acts of two or more person's might jointly produce it.

Also see Wis JI-Criminal 901, Cause.

4. This is the definition of "bodily harm" provided in § 939.22(4).

5. Section 940.203(1)(b) provides a definition of "judge" for the purpose of this offense. As amended by 2017 Wisconsin Act 352 that definition provides: "'Judge' means a person who currently is or who formerly was a supreme court justice, court of appeals judge, circuit court judge, municipal judge, tribal judge, temporary or permanent reserve judge or circuit, supplemental, or municipal court commissioner."

The applicable term should be inserted in the blank.

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6. Section 940.203(1)(a) provides a definition of "family member" for the purpose of this offense: "'Family member' means a parent, spouse, sibling, child, stepchild, or foster child."

The applicable term should be inserted in the blank.

7. See note 1, supra.

8. "Employed" is used here in the general sense of being engaged in the performance of a duty.

9. The definition of "official capacity" is taken from Wis JI-Criminal 915. See the Comment to that instruction for further discussion.

10. The duties of judges may be set forth in the Wisconsin Statutes. When that is the case, the Committee suggests using the sentence in brackets and describing the duties in the blank. The Committee has concluded that the jury may be informed of the law that declares what a person's official duties are without running the risk of directing a verdict on an element of the crime. It is still for the jury to determine whether the person was performing the duty in the particular case. But see, State v. Jensen, 2007 WI App 256, 306 Wis.2d 572, 743 N.W.2d 468; and, State v. Schultz, 2007 WI App 257, 306 Wis.2d 598, 743 N.W.2d 823.

11. If the definition of "without consent" is believed to be necessary, see Wis JI-Criminal 948 which provides an instruction based on the definition provided in § 939.22(48). That definition provides that "without consent" means "no consent in fact" or that consent was given because of fear, a claim of legal authority by the defendant, or misunderstanding.

12. "Intentionally" requires either mental purpose to cause the result or awareness that the conduct is practically certain to cause it. § 939.23(3). The Committee concluded that the mental purpose alternative is most likely to apply to this offense. See Wis JI-Criminal 923A and 923B.

"Intentionally" also generally requires knowledge of all facts necessary to make the conduct criminal which follow the word "intentionally" in the statute. § 939.23(3). This general rule appears to be countered by the drafting style of § 940.203 which divides the facts necessary to constitute the crime among several subsections of the statute. The Committee concluded that the knowledge requirement that usually accompanies the use of "intentionally" does not carry over to the three facts set forth in (2)(a), through (b) and (c). Sub. (2)(a) has its own mental state – "knows or should have known" and thereby breaks the connections between "intentionally" used in sub. (2) proper and the other facts that follow.

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1240B THREAT TO A JUDGE — § 940.203(2)

Statutory Definition of the Crime

Section 940.203 of the Criminal Code of Wisconsin is violated by one who intentionally threatens to cause bodily harm to the (person) (family member) of any judge where at the time of the act the person knows[1] that the victim is a (judge) (family member of a judge), the act is in response to an action taken in the judge's official capacity,[2] and there is no consent by the person harmed.

State's Burden of Proof

Before you may find the defendant guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following six elements were present.

Elements of the Crime That the State Must Prove

1. The defendant threatened to cause bodily harm to (name of victim).

   "Bodily harm" means physical pain or injury, illness, or any impairment of physical condition.[3]

2. (Name of victim) was a (judge) (family member of a judge).

   [For the purpose of this offense, a (e.g., circuit court judge) is a judge.][4]

   [For the purpose of this offense, a (e.g., child) is a family member.][5]

3. The defendant knew[6] that (name of victim) was a (judge) (family member of a judge).

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4. The threat was in response to an action taken in the judge's official capacity.

   Judges act in an official capacity when they perform duties that they are employed[7] to perform.[8] [The duties of a judge include: _____].[9]

5. The defendant threatened to cause bodily harm to (name of victim) without the consent[10] of (name of victim).

6. The defendant acted intentionally. This requires that the defendant acted with the mental purpose to cause bodily harm to (name of victim).[11]

Deciding About Intent and Knowledge

You cannot look into a person's mind to find intent or knowledge. Intent and knowledge must be found, if found at all, from the defendant's acts, words, and statements, if any, and from all the facts and circumstances in this case bearing upon intent and knowledge.

Jury's Decision

If you are satisfied beyond a reasonable doubt that all six elements of this offense have been proved, you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.

COMMENT

Wis JI-Criminal 1240A was originally published in 1994. The 2002 revision divided the single instruction into two instructions, WI JI-Criminal 1240A and 1240B. Wis JI-Criminal 1240A was revised in 2008 to change the definition of "official capacity." The 2016 revision updated the Comment to reflect changes made by the 2015 Wisconsin Act 78. The 2018 revision reflected changes made by 2017 Wisconsin Act 272 [effective date: April 13, 2018] and 2017 Wisconsin Act 352 [effective date: April 18, 2018] . This instruction was revised in 2019 to correct a typographical error in element one.

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Section 940.203 was created by 1993 Wisconsin Act 50 [effective date: November 25, 1993] and originally applied only to the offenses against judges and their family members. It was amended by 2015 Wisconsin Act 78 [effective date: November 13, 2015] to add prosecutors and law enforcement officers. Section 940.203 was amended again by 2017 Wisconsin Act 272 to include officers of the court. This instruction is drafted for violations under § 940.203 involving threats to a judge; for violations based on battery to a judge, see Wis-JI Criminal 1240A. For battery and threats to prosecutors and law enforcement officers, see Wis JI-Criminal 1240C and 1240D. For battery and threats to a current or former guardian ad litem, corporation counsel, or attorney, see Wis JI-Criminal 1241A and 1241B.

1. Neither the summary of the offenses here nor the third element contain the alternative "or should have known" found as part of the offense definition in sec. 940.203(2)(a). The Committee believed the phrase would be inapplicable in virtually all cases because a connection is required between the act or threat and the prosecutor's or law enforcement officer's official capacity. That is, the act or threat must be committed in response to an action taken in the person's official capacity. Therefore, it may be confusing to instruct the jury on the "should have known" alternative. Of course, if that alternative fits the facts of the case, it should be added to the instruction.

2. 2015 Wisconsin Act 109 amended § 940.203 to delete what was previously an alternative for this aspect of the offense definition: "... the judge is acting in an official capacity at the time of the act or threat..."

3. This is the definition of "bodily harm" provided in § 939.22(4).

4. Section 940.203(1)(b) provides a definition of "judge" for the purpose of this offense. As amended by 2017 Wisconsin Act 352 that definition provides: "'Judge' means a person who currently is or who formerly was a supreme court justice, court of appeals judge, circuit court judge, municipal judge, tribal judge, temporary or permanent reserve judge or circuit, supplemental, or municipal court commissioner."

The applicable term should be inserted in the blank.

5. Section 940.203(1)(a) provides a definition of "family member" for the purpose of this offense: "'Family member' means a parent, spouse, sibling, child, stepchild, or foster child."

The applicable term should be inserted in the blank.

6. See note 1, supra.

7. "Employed" is used here in the general sense of being engaged in the performance of a duty.

8. The definition of "official capacity" is taken from Wis JI-Criminal 915. See the Comment to that instruction for further discussion.

9. The duties of judges may be set forth in the Wisconsin Statutes. When that is the case, the Committee suggests using the sentence in brackets and describing the duties in the blank. The Committee has concluded that the jury may be informed of the law that declares what a person's official duties are without running the risk of directing a verdict on an element of the crime. It is still for the jury to determine whether the person was performing the duty in the particular case. But see, State v. Jensen, 2007 WI App

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256, 306 Wis.2d 572, 743 N.W.2d 468; and, State v. Schultz, 2007 WI App 257, 306 Wis.2d 598, 743 N.W.2d 823.

10. If the definition of "without consent" is believed to be necessary, see Wis JI-Criminal 948 which provides an instruction based on the definition provided in § 939.22(48). That definition provides that "without consent" means "no consent in fact" or that consent was given because of fear, a claim of legal authority by the defendant, or misunderstanding.

11. "Intentionally" requires either mental purpose to cause the result or awareness that the conduct is practically certain to cause it. § 939.23(3). The Committee concluded that the mental purpose alternative is most likely to apply to this offense. See Wis JI-Criminal 923A and 923B.

"Intentionally" also generally requires knowledge of all facts necessary to make the conduct criminal which follow the word "intentionally" in the statute. § 939.23(3). This general rule appears to be countered by the drafting style of § 940.203 which divides the facts necessary to constitute the crime among several subsections of the statute. The Committee concluded that the knowledge requirement that usually accompanies the use of "intentionally" does not carry over to the three facts set forth in (2)(a), through (b) and (c). Sub. (2)(a) has its own mental state – "knows or should have known" and thereby breaks the connections between "intentionally" used in sub. (2) proper and the other facts that follow.

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1240C BATTERY TO A PROSECUTOR OR LAW ENFORCEMENT OFFICER — § 940.203(2)

Statutory Definition of the Crime

Section 940.203 of the Criminal Code of Wisconsin is violated by one who intentionally causes bodily harm to the (person) (family member) of a (prosecutor) (law enforcement officer) where at the time of the act the person knows[1] that the victim is a [(prosecutor) (law enforcement officer)] [family member of a (prosecutor) (law enforcement officer)], the act is in response to an action taken in the (prosecutor's) (law enforcement officer's) official capacity and there is no consent by the person harmed.

State's Burden of Proof

Before you may find the defendant guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following six elements were present.

Elements of the Crime That the State Must Prove

1. The defendant caused bodily harm to (name of victim).

   "Cause" means that the defendant's conduct was a substantial factor in producing bodily harm.[2]

   "Bodily harm" means physical pain or injury, illness, or any impairment of physical condition.[3]

2. (Name of victim) was a [(prosecutor) (law enforcement officer)] [family member of a (prosecutor) (law enforcement officer)].

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[A (e.g., district attorney) is a prosecutor.][4]

[A (insert title, e.g., sheriff) is a law enforcement officer.][5]

[For the purpose of this offense, a (e.g., child) is a family member.][6]

3. The defendant knew[7] that (name of victim) was a [(prosecutor) (law enforcement officer)] [family member of a (prosecutor) (law enforcement officer)].

4. The defendant caused bodily harm in response to an action taken in the (prosecutor's) (law enforcement officer's) official capacity.

   (Prosecutors) (law enforcement officers) act in an official capacity when they perform duties that they are employed[8] to perform.[9] [The duties of a (prosecutor) (law enforcement officer) include: _____].[10]

5. The defendant caused bodily harm to (name of victim) without the consent[11] of (name of victim).

6. The defendant acted intentionally. This requires that the defendant acted with the mental purpose to cause bodily harm to (name of victim). [12]

Deciding About Intent and Knowledge

You cannot look into a person's mind to find intent or knowledge. Intent and knowledge must be found, if found at all, from the defendant's acts, words, and statements, if any, and from all the facts and circumstances in this case bearing upon intent and knowledge.

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Jury's Decision

If you are satisfied beyond a reasonable doubt that all six elements of this offense have been proved, you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty

COMMENT

Wis JI-Criminal 1240C was originally published in 2016 and revised in 2017, 2018, and 2019. The 2018 revision reflected changes made by 2017 Wisconsin Act 272 [effective date: April 13, 2018] and 2017 Wisconsin Act 352 [effective date: April 18, 2018] . The 2019 revision corrects a typographical error in element one.

Section 940.203 originally applied only to the offenses against judges and their family members. It was amended by 2015 Wisconsin Act 78 [effective date: November 13, 2015] to add prosecutors and law enforcement officers. Section 940.203 was amended again by 2017 Wisconsin Act 272 to include officers of the court. This instruction is drafted for violations under § 940.203 involving battery to a prosecutor or law enforcement officer; for violations based on threats to a prosecutor or law enforcement officer, see Wis-JI Criminal 1240D. For battery and threats to a judge, see Wis JI-Criminal 1240A and 1240B. For battery and threats to a current or former guardian ad litem, corporation counsel, or attorney, see Wis JI-Criminal 1241A and 1241B.

1. Neither the summary of the offenses here nor the third element contain the alternative "or should have known" found as part of the offense definition in sec. 940.203(2)(a). The Committee believed the phrase would be inapplicable in virtually all cases because a connection is required between the act or threat and the prosecutor's or law enforcement officer's official capacity. That is, the act or threat must be committed in response to an action taken in the person's official capacity. Therefore, it may be confusing to instruct the jury on the "should have known" alternative. Of course, if that alternative fits the facts of the case, it should be added to the instruction.

2. The Committee concluded that the simple "substantial factor" definition of cause should be sufficient for most cases. Where there is evidence of more than one possible cause, something like the following might be added:

There may be more than one cause of bodily harm. The act of one person alone might produce it, or the acts of two or more person's might jointly produce it.

Also see Wis JI-Criminal 901, Cause.

3. This is the definition of "bodily harm" provided in § 939.22(4).

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4. In the Committee's judgement, the jury may be told, for example, that district attorney is a prosecutor. It is still for the jury to be satisfied that, in the example, the victim was a district attorney. Section 940.203(d) provides a definition of "prosecutor" for the purposes of this offense:

"Prosecutor" means a person who currently is or formerly was any of the following:

1. A district attorney, a deputy district attorney, an assistant district attorney, or a special prosecutor under s. 978.045 or 978.05(8)(b).
2. The attorney general, a deputy attorney general, or an assistant attorney general.
3. A tribal prosecutor.

The applicable term should be inserted in the blank.

5. In the Committees judgment, the jury may be told, for example, that a sheriff is a law enforcement officer. It is still for the jury to be satisfied that, in the example, the victim was sheriff.

Section 940.203(1)(c) as amended by 2017 Wisconsin Act 352 provides the following definition of "law enforcement officer":

(c) "Law enforcement officer" means any person who currently is or was employed by the state, by any political subdivision, or as a tribal law enforcement officer for the purpose of detecting and preventing crime and enforcing laws or ordinances and who is authorized to make arrests for violations of the laws or ordinances the person is employed to enforce, whether that enforcement authority extends to all laws or ordinances or is limited to specific laws or ordinances.

6. Section 940.203(1)(a) provides a definition of "family member" for the purpose of this offense: "'Family member' means a parent, spouse, sibling, child, stepchild, or foster child."

The applicable term should be inserted in the blank.

7. See note 1, supra.

8. "Employed" is used here in the general sense of being engaged in the performance of a duty.

9. The definition of "official capacity" is taken from Wis JI-Criminal 915. See the Comment to that instruction for further discussion.

Referring to this offense as defined under § 940.20(2), 2005-2006 Wis. Stats., the Wisconsin Court of Appeals clarified that "acting with lawful authority" – an element of resisting or obstructing an officer under § 946.41 – is not an element of battery to a law enforcement officer: "…a law enforcement officer need not be acting 'lawfully' for what he or she does to be done in the officer's 'official capacity.' Rather the officer need only be acting within his or her jurisdiction as an officer and not on some 'personal frolic' unrelated to the officer's law-enforcement responsibilities." State v. Haywood, 2009 WI App 178, 11, 322 Wis.2d 691, 777 N.W.2d 921.

In State v. Rowan, 2012 WI 60, 341 Wis.2d 281, 814 N.W.2d 854, the supreme court found the evidence sufficient to satisfy the "acting in an official capacity" requirement where a police officer was called to a hospital to assist in restraining a combative suspect who was under arrest.

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10. The duties, powers, or responsibilities of some public officers, officials, and employees are set forth in the Wisconsin Statutes or Administrative Code. When that is the case, the Committee suggests using the sentence in brackets and describing the duties in the blank. The Committee has concluded that the jury may be informed of the law that declares what a person's official duties are without running the risk of directing a verdict on an element of the crime. It is still for the jury to determine whether the person was performing the duty in the particular case. But see, State v. Jensen, 2007 WI App 256, 306 Wis.2d 572, 743 N.W.2d 468; and, State v. Schultz, 2007 WI App 257, 306 Wis.2d 598, 743 N.W.2d 823.

11. If the definition of "without consent" is believed to be necessary, see Wis JI-Criminal 948 which provides an instruction based on the definition provided in § 939.22(48). That definition provides that "without consent" means "no consent in fact" or that consent was given because of fear, a claim of legal authority by the defendant, or misunderstanding.

12. "Intentionally" requires either mental purpose to cause the result or awareness that the conduct is practically certain to cause it. § 939.23(3). The Committee concluded that the mental purpose alternative is most likely to apply to this offense. See Wis JI-Criminal 923A and 923B.

"Intentionally" also generally requires knowledge of all facts necessary to make the conduct criminal which follow the word "intentionally" in the statute. § 939.23(3). This general rule appears to be countered by the drafting style of § 940.203 which divides the facts necessary to constitute the crime among several subsections of the statute. The Committee concluded that the knowledge requirement that usually accompanies the use of "intentionally" does not carry over to the three facts set forth in (2)(a), through (b) and (c). Sub. (2)(a) has its own mental state – "knows or should have known" and thereby breaks the connections between "intentionally" used in sub. (2) proper and the other facts that follow.

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1240D THREAT TO A PROSECUTOR OR LAW ENFORCEMENT OFFICER — § 940.203(2)

Statutory Definition of the Crime

Section 940.203 of the Criminal Code of Wisconsin is violated by one who intentionally threatens to cause bodily harm to the (person) (family member) of a of a (prosecutor) (law enforcement officer) where at the time of the threat the person knows[1] that the victim is a current or former [(prosecutor) (law enforcement officer)] [family member of a (prosecutor) (law enforcement officer)], the threat is in response to an action taken in the (prosecutor's) (law enforcement officer's) official capacity and there is no consent by the person threatened.

State's Burden of Proof

Before you may find the defendant guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following six elements were present.

Elements of the Crime That the State Must Prove

1. The defendant threatened to cause bodily harm to (name of victim).

[A "threat" is an expression of intention to do harm and may be communicated orally, in writing, or by conduct. This element requires a true threat. "True threat" means that a reasonable person making the threat would foresee that a reasonable person would interpret the threat as a serious expression of intent to do harm. It is not necessary that the person making the threat have the ability to carry

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out the threat. You must consider all the circumstances in determining whether a threat is a true threat.][2]

"Bodily harm" means physical pain or injury, illness, or any impairment of physical condition.[3]

2. (Name of victim) was a [(prosecutor) (law enforcement officer)] [family member of a (prosecutor) (law enforcement officer)].

[A (e.g., district attorney) is a prosecutor.][4]

[A (insert title, e.g., sheriff) is a law enforcement officer.][5]

[For the purpose of this offense, a (e.g., child) is a family member.][6]

3. The defendant knew[7] that (name of victim) was a [(prosecutor) (law enforcement officer)] [family member of a (prosecutor) (law enforcement officer)].

4. The threat was in response to an action taken in the (prosecutor's) (law enforcement officer's) official capacity.

(Prosecutors) (law enforcement officers) act in an official capacity when they perform duties that they a employed[8] to perform.[9] [The duties of a (prosecutor) (law enforcement officer) include: _____].[10]

5. The defendant threatened to cause bodily harm to (name of victim) without the consent[11] of (name of victim).

6. The defendant acted intentionally. This requires that the defendant acted with the mental purpose to threaten bodily harm to another human being.[12]

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Deciding About Intent and Knowledge

You cannot look into a person's mind to find intent or knowledge. Intent and knowledge must be found, if found at all, from the defendant's acts, words, and statements, if any, and from all the facts and circumstances in this case bearing upon intent and knowledge.

Jury's Decision

If you are satisfied beyond a reasonable doubt that all six elements of this offense have been proved, you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.

COMMENT

Wis JI-Criminal 1240D was originally published in 2016 and revised in 2017, 2018, and 2019. The 2018 revision reflected changes made by 2017 Wisconsin Act 272 [effective date: April 13, 2018] and 2017 Wisconsin Act 352 [effective date: April 18, 2018] . The 2019 revision corrects a typographical error in element one.

Section 940.203 originally applied only to the offenses against judges and their family members. It was amended by 2015 Wisconsin Act 78 [effective date: November 13, 2015] to add prosecutors and law enforcement officers. Section 940.203 was amended again by 2017 Wisconsin Act 272 to include officers of the court. This instruction is drafted for violations under § 940.203 involving threats to a prosecutor or law enforcement officer; for violations based on battery to a prosecutor or law enforcement officer, see Wis-JI Criminal 1240AC. For battery and threats to a judge, see Wis JI-Criminal 1240A and 1240B. For battery and threats to a current or former guardian ad litem, corporation counsel, or attorney, see Wis JI-Criminal 1241A and 1241B.

1. Neither the summary of the offenses here nor the third element contain the alternative "or should have known" found as part of the offense definition in sec. 940.203(2)(a). The Committee believed the phrase would be inapplicable in virtually all cases because a connection is required between the act or threat and the prosecutor's, or law enforcement officer's official capacity. That is, the act or threat must be committed in response to an action taken in the person's official capacity. Therefore, it may be confusing to instruct the jury on the "should have known" alternative. Of course, if that alternative fits the facts of the case, it should be added to the instruction.

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2. This definition is based on one of the descriptions of "true threat" in State v. Perkins, 2001 WI 46, 28, 243 Wis.2d 141, 626 N.W.2d 762. Perkins held that a jury instruction for a threat to a judge in violation of § 940.203 was an incomplete statement of the law because it did not define "threat" as "true threat." This created an unacceptable risk that "the jury may have used the common definition of 'threat,' thereby violating the defendant's constitutional right to freedom of speech." 2001 WI 46, ¶43. The court stated: "The common definition of threat is an expression of an intention to inflict injury on another. The definition of threat for the purposes of the statute criminalizing language is much narrower." 2001 WI 46, 43.

The following is the most complete definition of "true threat" offered by the court in Perkins:

> A true threat is a statement that a speaker would reasonably foresee that a listener would reasonably interpret as a serious expression of a purpose to inflict harm, as distinguished from hyperbole, jest, innocuous talk, expressions of political views, or other similarly protected speech. It is not necessary that the speaker have the ability to carry out the threat. In determining whether a statement is a true threat, the totality of the circumstances must be considered. 2001 WI 46, 29.

The Committee concluded that the definition in the instruction is equivalent in context and will be more understandable to the jury. In a case decided at the same time as Perkins, the court used a definition much like the one used in the instruction. See State v. A.S., 2001 WI 48, 23, 243 Wis.2d 173, 626 N.W.2d 712.

Perkins involved an orally communicated threat. The instruction is drafted more broadly to be applicable whether the threat is communicated orally, in writing, or by conduct.

In Elonis v. United States, 575 U.S. , 135 S.Ct. 2001 (2015), the United States Supreme Court interpreted a federal statute making it a crime to transmit in interstate commerce "any communication containing any threat … to injure the person of another." 18 USC § 875(c). Because the statute was not clear as to what mental state was required, there was a split in the federal circuits on that issue. Elonis was convicted under instructions that required the jury to find that he communicated what a reasonable person would regard as a threat. The Supreme Court concluded that this was not sufficient: "Federal criminal liability generally does not turn solely on the results of an act without considering the defendant's mental state." The decision did not specify what mental state is required. The decision was based on constitutional requirements – it was a matter of interpreting a federal statute – so it has no direct impact on Wisconsin law. The committee concluded that the definition of "true threat" used in this instruction is sufficient to meet any requirements that may be implied from the decision in Elonis, especially in light of element 6 which requires that "the defendant acted with the mental purpose to threaten bodily harm to another…"

3. This is the definition of "bodily harm" provided in § 939.22(4).

4. In the Committee's judgement, the jury may be told, for example, that district attorney is a prosecutor. It is still for the jury to be satisfied that, in the example, the victim was a district attorney. Section 940.203(d) provides a definition of "prosecutor" for the purposes of this offense:

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"Prosecutor" means a person who currently is or formerly was any of the following:

1. A district attorney, a deputy district attorney, an assistant district attorney, or a special prosecutor under s. 978.045 or 978.05(8)(b).
2. The attorney general, a deputy attorney general, or an assistant attorney general.
3. A tribal prosecutor.

The applicable term should be inserted in the blank.

5. In the Committees judgment, the jury may be told, for example, that a sheriff is a law enforcement officer. It is still for the jury to be satisfied that, in the example, the victim was sheriff.

Section 940.203(1)(c) as amended by 2017 Wisconsin Act 352 provides the following definition of "law enforcement officer":

(c) "Law enforcement officer" means any person who currently is or was employed by the state, by any political subdivision, or as a tribal law enforcement officer for the purpose of detecting and preventing crime and enforcing laws or ordinances and who is authorized to make arrests for violations of the laws or ordinances the person is employed to enforce, whether that enforcement authority extends to all laws or ordinances or is limited to specific laws or ordinances.

6. Section 940.203(1)(a) provides a definition of "family member" for the purpose of this offense: "'Family member' means a parent, spouse, sibling, child, stepchild, or foster child."

The applicable term should be inserted in the blank.

7. See note 1, supra.

8. "Employed" is used here in the general sense of being engaged in the performance of a duty.

9. The definition of "official capacity" is taken from Wis JI-Criminal 915. See the Comment to that instruction for further discussion.

10. The duties, powers, or responsibilities of some public officers, officials, and employees are set forth in the Wisconsin Statutes or Administrative Code. When that is the case, the Committee suggests using the sentence in brackets and describing the duties in the blank. The Committee has concluded that the jury may be informed of the law that declares what a person's official duties are without running the risk of directing a verdict on an element of the crime. It is still for the jury to determine whether the person was performing the duty in the particular case. But see, State v. Jensen, 2007 WI App 256, 306 Wis.2d 572, 743 N.W.2d 468; and, State v. Schultz, 2007 WI App 257, 306 Wis.2d 598, 743 N.W.2d 823.

11. If the definition of "without consent" is believed to be necessary, see Wis JI-Criminal 948 which provides an instruction based on the definition provided in § 939.22(48). That definition provides that "without consent" means "no consent in fact" or that consent was given because of fear, a claim of legal authority by the defendant, or misunderstanding.

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12. "Intentionally" requires either mental purpose to cause the result or awareness that the conduct is practically certain to cause it. § 939.23(3). The Committee concluded that the mental purpose alternative is most likely to apply to this offense. See Wis JI-Criminal 923A and 923B.

"Intentionally" also generally requires knowledge of all facts necessary to make the conduct criminal which follow the word "intentionally" in the statute. § 939.23(3). This general rule appears to be countered by the drafting style of § 940.203 which divides the facts necessary to constitute the crime among several subsections of the statute. The Committee concluded that the knowledge requirement that usually accompanies the use of "intentionally" does not carry over to the three facts set forth in (2)(a), through (b) and (c). Sub. (2)(a) has its own mental state – "knows or should have known" and thereby breaks the connections between "intentionally" used in sub. (2) proper and the other facts that follow.

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1241A BATTERY TO GUARDIAN AD LITEM, CORPORATION COUNSEL, OR ATTORNEY — § 940.203(3)

Statutory Definition of the Crime

Section 940.203(3) of the Criminal Code of Wisconsin is violated by one who intentionally causes bodily harm to the (person) (family member) of (a guardian ad litem) (a corporation counsel) (an attorney) where at the time of the act the person knows[1] that the victim is [(a guardian ad litem) (a corporation counsel) (an attorney)] [a family member of (a guardian ad litem) (a corporation counsel) (an attorney)], the act is in response to an action taken in the (guardian ad litem's) (corporation counsel's) (attorney's) official capacity and there is no consent by the person harmed.

State's Burden of Poof

Before you may find the defendant guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following six elements were present.

Elements of the Crime That the State Must Prove

1. The defendant caused bodily harm to (name of victim).

   "Cause" means that the defendant's conduct was a substantial factor in producing bodily harm.[2]

   "Bodily harm" means physical pain or injury, illness, or any impairment of physical condition.[3]

2. (Name of victim) was a [current or former (guardian ad litem)[4] (corporation counsel)[5] (attorney)[6]] [family member of a current or former (guardian ad litem) (corporation counsel) (attorney)].

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[For the purpose of this offense, a (e.g., child) is a family member.][7]

3. The defendant knew[8] that (name of victim) was [(a guardian ad litem) (a corporation counsel) (an attorney)] [a family member of (a guardian ad litem) (a corporation counsel) (an attorney)].

4. The defendant caused bodily harm in response to an action taken in the (guardian ad litem's) (corporation counsel's) (attorney's) official capacity in a proceeding under chapter (specify the Wisconsin Statutes chapter).[9]

(Guardians ad litem) (Corporation counsel) (Attorneys) act in an official capacity when they perform duties that they are employed[10] to perform.[11] [The duties of a (guardian ad litem) (corporation counsel) (attorney) include: _____].[12]

A _____ is a proceeding under chapter (specify the Wisconsin Statutes chapter).[13]

5. The defendant caused bodily harm to (name of victim) without the consent[14] of (name of victim).

6. The defendant acted intentionally. This requires that the defendant acted with the mental purpose to cause bodily harm to (name of victim).[15]

Deciding About Intent and Knowledge

You cannot look into a person's mind to find intent or knowledge. Intent and knowledge must be found, if found at all, from the defendant's acts, words, and statements, if any, and from all the facts and circumstances in this case bearing upon intent and knowledge.

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Jury's Decision

If you are satisfied beyond a reasonable doubt that all six elements of this offense have been proved, you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.

COMMENT

Wis JI-Criminal 1241A was approved by the Committee in July 2018.

Section 940.203 originally applied only to the offenses against judges and their family members. It was amended by 2015 Wisconsin Act 78 [effective date: November 13, 2015] to add prosecutors and law enforcement officers. Section 940.203 was amended again by 2017 Wisconsin Act 272 [effective date: April 13, 2018]. The title of § 940.203 was amended to read as "Battery or threat to a judge, prosecutor, an officer of the court or law enforcement officer." This instruction is drafted for violations under § 940.203(3) involving battery to a current or former guardian ad litem, corporation counsel, or attorney; for violations based on threats to a current or former guardian ad litem, corporation counsel, or attorney, see Wis-JI Criminal 1241B. For battery and threats to a judge, see Wis JI-Criminal 1240A and 1240B. For battery and threats to a prosecutor or law enforcement officer, see Wis JI-Criminal 1240C and 1240D.

1. Neither the summary of the offenses here nor the third element contain the alternative "or should have known" found as part of the offense definition in sec. 940.203(2)(a). The Committee believed the phrase would be inapplicable in virtually all cases because a connection is required between the act or threat and guardian ad litem's, corporation counsel's, attorney's official capacity. That is, the act or threat must be committed in response to an action taken in the person's official capacity. Therefore, it may be confusing to instruct the jury on the "should have known" alternative. Of course, if that alternative fits the facts of the case, it should be added to the instruction.

2. The Committee concluded that the simple "substantial factor" definition of cause should be sufficient for most cases. Where there is evidence of more than one possible cause, something like the following might be added:

There may be more than one cause of bodily harm. The act of one person alone might produce it, or the acts of two or more persons might jointly produce it.

Also see Wis JI-Criminal 901, Cause.

3. This is the definition of "bodily harm" provided in § 939.22(4).

4. Section 54.40(2) provides the duties of "guardian ad litem."

5. Section 59.42 provides the duties of "corporation counsel."

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6. Section 940.203(1)(ac) provides that "attorney" means a legal professional practicing law as defined in SCR 23.01. The practice of law in in Wisconsin is defined in SCR 23.01 as "[t]he application of legal principles and judgment with regard to the circumstances or objectives of another entity or person(s) where there is a client relationship of trust or reliance and which require the knowledge, judgment, and skill of a person trained as a lawyer. The practice of law includes but is not limited to:

1. Giving advice or counsel to others as to their legal rights or the legal rights or responsibilities of others for fees or other consideration.
2. Selection, drafting, or completion for another entity or person of legal documents or agreements which affect the legal rights of the other entity or person(s).
3. Representation of another entity or person(s) in a court, or in a formal administrative adjudicative proceeding or other formal dispute resolution process or in an administrative adjudicative proceeding in which legal pleadings are filed or a record is established as the basis for judicial review.
4. Negotiation of legal rights or responsibilities on behalf of another entity or person(s).
5. Any other activity determined to be the practice of law by the Wisconsin Supreme Court.

7. Section 940.203(1)(a) provides a definition of "family member" for the purpose of this offense: "'Family member' means a parent, spouse, sibling, child, stepchild, or foster child."

The applicable term should be inserted in the blank.

8. See note 1, supra.

9. Section 940.203(3)(b) specifies that the act be in response to "an action taken by the current or former guardian ad litem, corporation counsel, or attorney in his or her official capacity in a proceeding under ch. 48, 51, 54, 55, 767, 813, or 938."

10. "Employed" is used here in the general sense of being engaged in the performance of a duty.

11. The definition of "official capacity" is taken from Wis JI-Criminal 915. See the Comment to that instruction for further discussion.

12. The duties, powers, or responsibilities of some public officers, officials, and employees are set forth in the Wisconsin Statutes or Administrative Code. When that is the case, the Committee suggests using the sentence in brackets and describing the duties in the blank. The Committee has concluded that the jury may be informed of the law that declares what a person's official duties are without running the risk of directing a verdict on an element of the crime. It is still for the jury to determine whether the person was performing the duty in the particular case. But see, State v. Jensen, 2007 WI App 256, 306 Wis.2d 572, 743 N.W.2d 468; and, State v. Schultz, 2007 WI App 257, 306 Wis.2d 598, 743 N.W.2d 823.

13. Wisconsin Statutes ch. 48, 51, 54, 55, 767, 813, or 938.

14. If the definition of "without consent" is believed to be necessary, see Wis JI-Criminal 948 which provides an instruction based on the definition provided in § 939.22(48). That definition provides that "without consent" means "no consent in fact" or that consent was given because of fear, a claim of legal authority by the defendant, or misunderstanding.

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15. "Intentionally" requires either mental purpose to cause the result or awareness that the conduct is practically certain to cause it. § 939.23(3). The Committee concluded that the mental purpose alternative is most likely to apply to this offense. See Wis JI-Criminal 923A and 923B.

"Intentionally" also generally requires knowledge of all facts necessary to make the conduct criminal which follow the word "intentionally" in the statute. § 939.23(3). This general rule appears to be countered by the drafting style of § 940.203 which divides the facts necessary to constitute the crime among several subsections of the statute. The Committee concluded that the knowledge requirement that usually accompanies the use of "intentionally" does not carry over to the three facts set forth in (2)(a), through (b) and (c). Sub. (2)(a) has its own mental state – "knows or should have known" and thereby breaks the connections between "intentionally" used in sub. (2) proper and the other facts that follow.

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1241B THREAT TO GUARDIAN AD LITEM, CORPORATION COUNSEL, OR ATTORNEY — § 940.203(3)

Statutory Definition of the Crime

Section 940.203(3) of the Criminal Code of Wisconsin is violated by one who intentionally threatens to cause bodily harm to the (person) (family member) of (a guardian ad litem) (a corporation counsel) (an attorney) where at the time of the threat the person knows[1] that the victim is [(a guardian ad litem) (a corporation counsel) (an attorney)] [a family member of (a guardian ad litem) (a corporation counsel) (an attorney)], the threat is in response to an action taken in the (guardian ad litem's) (corporation counsel's) (attorney's) official capacity and there is no consent by the person threatened.

State's Burden of Proof

Before you may find the defendant guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following six elements were present.

Elements of the Crime That the State Must Prove

1. The defendant threatened to cause bodily harm to (name of victim).

   [A "threat" is an expression of intention to do harm and may be communicated orally, in writing, or by conduct. This element requires a true threat. "True threat" means that a reasonable person making the threat would foresee that a reasonable person would interpret the threat as a serious expression of intent to do harm. It is not necessary that the person making the threat have the ability to carry out the threat. You must consider all the circumstances in determining whether a threat is a true threat.][2]

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"Bodily harm" means physical pain or injury, illness, or any impairment of physical condition.[3]

2. (Name of victim) was a [current or former (guardian ad litem)[4] (corporation counsel)[5] (attorney)[6]] [family member of a current or former (guardian ad litem) (corporation counsel) (attorney)].

   [For the purpose of this offense, a (e.g., child) is a family member.][7]

3. The defendant knew[8] that (name of victim) was [(a guardian ad litem) (a corporation counsel) (an attorney)] [a family member of (a guardian ad litem) (a corporation counsel) (an attorney)].

4. The threat was in response to an action taken in the current or former (guardian ad litem's) (corporation counsel's) (attorney's) official capacity in a proceeding under chapter (specify the Wisconsin Statutes chapter).[9]

   (Guardians ad litem) (Corporation counsel) (Attorneys) act in an official capacity when they perform duties that they are employed[10] to perform.[11] [The duties of a (guardian ad litem) (corporation counsel) (attorney) include: _____].[12]

   A _____ is a proceeding under chapter (specify the Wisconsin Statutes chapter).[13]

5. The defendant threatened to cause bodily harm to (name of victim) without the consent[14] of (name of victim).

6. The defendant acted intentionally. This requires that the defendant acted with the mental purpose to threaten bodily harm to another human being.[15]

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Deciding About Intent and Knowledge

You cannot look into a person's mind to find intent or knowledge. Intent and knowledge must be found, if found at all, from the defendant's acts, words, and statements, if any, and from all the facts and circumstances in case this bearing upon intent and knowledge.

Jury's Decision

If you are satisfied beyond a reasonable doubt that all six elements of this offense have been proved, you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.

COMMENT

Wis JI-Criminal 1241B was approved by the Committee in July 2018.

Section 940.203 originally applied only to the offenses against judges and their family members. It was amended by 2015 Wisconsin Act 78 [effective date: November 13, 2015] to add prosecutors and law enforcement officers. Section 940.203 was amended again by 2017 Wisconsin Act 272 [effective date: April 13, 2018]. The title of § 940.203 was amended to read as "Battery or threat to a judge, prosecutor, an officer of the court or law enforcement officer." This instruction is drafted for violations under § 940.203(3) involving threats to a current or former guardian ad litem, corporation counsel, or attorney; for violations based on battery to a current or former guardian ad litem, corporation counsel, or attorney, see Wis-JI Criminal 1241A. For battery and threats to a judge, see Wis JI-Criminal 1240A and 1240B. For battery and threats to a prosecutor or law enforcement officer, see Wis JI-Criminal 1240C and 1240D.

1. Neither the summary of the offenses here nor the third element contain the alternative "or should have known" found as part of the offense definition in sec. 940.203(2)(a). The Committee believed the phrase would be inapplicable in virtually all cases because a connection is required between the act or threat and guardian ad litem's, corporation counsel's, or attorney's official capacity. That is, the act or threat must be committed in response to an action taken in the person's official capacity. Therefore, it may be confusing to instruct the jury on the "should have known" alternative. Of course, if that alternative fits the facts of the case, it should be added to the instruction.

2. This definition is based on one of the descriptions of "true threat" in State v. Perkins, 2001 WI 46, ¶28, 243 Wis.2d 141, 626 N.W.2d 762. Perkins held that a jury instruction for a threat to a judge in violation of § 940.203 was an incomplete statement of the law because it did not define "threat" as "true threat." This created an unacceptable risk that "the jury may have used the common definition of 'threat,' thereby violating the defendant's constitutional right to freedom of speech." 2001 WI 46, ¶43. The court stated: "The common definition of threat is an expression of an intention to inflict injury on another.

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The definition of threat for the purposes of the statute criminalizing language is much narrower." 2001 WI 46, ¶43.

The following is the most complete definition of "true threat" offered by the court in Perkins:

> A true threat is a statement that a speaker would reasonably foresee that a listener would reasonably interpret as a serious expression of a purpose to inflict harm, as distinguished from hyperbole, jest, innocuous talk, expressions of political views, or other similarly protected speech. It is not necessary that the speaker have the ability to carry out the threat. In determining whether a statement is a true threat, the totality of the circumstances must be considered. 2001 WI 46, ¶29.

The Committee concluded that the definition in the instruction is equivalent in context and will be more understandable to the jury. In a case decided at the same time as Perkins, the court used a definition much like the one used in the instruction. See State v. A.S., 2001 WI 48, ¶23, 243 Wis.2d 173, 626 N.W.2d 712.

Perkins involved an orally communicated threat. The instruction is drafted more broadly to be applicable whether the threat is communicated orally, in writing, or by conduct.

In Elonis v. United States, 575 U.S. ____, 135 S.Ct. 2001 (2015), the United States Supreme Court interpreted a federal statute making it a crime to transmit in interstate commerce "any communication containing any threat … to injure the person of another." 18 USC § 875(c). Because the statute was not clear as to what mental state was required, there was a split in the federal circuits on that issue. Elonis was convicted under instructions that required the jury to find that he communicated what a reasonable person would regard as a threat. The Supreme Court concluded that this was not sufficient: "Federal criminal liability generally does not turn solely on the results of an act without considering the defendant's mental state." The decision did not specify what mental state is required. The decision was based on constitutional requirements – it was a matter of interpreting a federal statute – so it has no direct impact on Wisconsin law. The committee concluded that the definition of "true threat" used in this instruction is sufficient to meet any requirements that may be implied from the decision in Elonis, especially in light of element 6 which requires that "the defendant acted with the mental purpose to threaten bodily harm to another…"

3. This is the definition of "bodily harm" provided in § 939.22(4).

4. Section 54.40(2) provides the duties of "guardian ad litem."

5. Section 59.42 provides the duties of "corporation counsel."

6. Section 940.203(1)(ac) provides that "attorney" means a legal professional practicing law as defined in SCR 23.01. The practice of law in in Wisconsin is defined in SCR 23.01 as "[t]he application of legal principles and judgment with regard to the circumstances or objectives of another entity or person(s) where there is a client relationship of trust or reliance and which require the knowledge, judgment, and skill of a person trained as a lawyer. The practice of law includes but is not limited to:

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1. Giving advice or counsel to others as to their legal rights or the legal rights or responsibilities of others for fees or other consideration.
2. Selection, drafting, or completion for another entity or person of legal documents or agreements which affect the legal rights of the other entity or person(s).
3. Representation of another entity or person(s) in a court, or in a formal administrative adjudicative proceeding or other formal dispute resolution process or in an administrative adjudicative proceeding in which legal pleadings are filed or a record is established as the basis for judicial review.
4. Negotiation of legal rights or responsibilities on behalf of another entity or person(s).
5. Any other activity determined to be the practice of law by the Wisconsin Supreme Court.

The applicable term should be inserted in the blank.

7. Section 940.203(1)(a) provides a definition of "family member" for the purpose of this offense: "'Family member' means a parent, spouse, sibling, child, stepchild, or foster child."

8. See note 1, supra.

9. Section 940.203(3)(b) specifies that the act be in response to "an action taken by the current or former guardian ad litem, corporation counsel, or attorney in his or her official capacity in a proceeding under ch. 48, 51, 54, 55, 767, 813, or 938."

10. "Employed" is used here in the general sense of being engaged in the performance of a duty.

11. The definition of "official capacity" is taken from Wis JI-Criminal 915. See the Comment to that instruction for further discussion.

12. The duties, powers, or responsibilities of some public officers, officials, and employees are set forth in the Wisconsin Statutes or Administrative Code. When that is the case, the Committee suggests using the sentence in brackets and describing the duties in the blank. The Committee has concluded that the jury may be informed of the law that declares what a person's official duties are without running the risk of directing a verdict on an element of the crime. It is still for the jury to determine whether the person was performing the duty in the particular case. But see, State v. Jensen, 2007 WI App 256, 306 Wis.2d 572, 743 N.W.2d 468; and, State v. Schultz, 2007 WI App 257, 306 Wis.2d 598, 743 N.W.2d 823.

13. Wisconsin Statutes ch. 48, 51, 54, 55, 767, 813, or 938.

14. If the definition of "without consent" is believed to be necessary, see Wis JI-Criminal 948 which provides an instruction based on the definition provided in § 939.22(48). That definition provides that "without consent" means "no consent in fact" or that consent was given because of fear, a claim of legal authority by the defendant, or misunderstanding.

15. "Intentionally" requires either mental purpose to cause the result or awareness that the conduct is practically certain to cause it. § 939.23(3). The Committee concluded that the mental purpose alternative is most likely to apply to this offense. See Wis JI-Criminal 923A and 923B.

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"Intentionally" also generally requires knowledge of all facts necessary to make the conduct criminal which follow the word "intentionally" in the statute. § 939.23(3). This general rule appears to be countered by the drafting style of § 940.203 which divides the facts necessary to constitute the crime among several subsections of the statute. The Committee concluded that the knowledge requirement that usually accompanies the use of "intentionally" does not carry over to the three facts set forth in (2)(a), through (b) and (c). Sub. (2)(a) has its own mental state – "knows or should have known" and thereby breaks the connections between "intentionally" used in sub. (2) proper and the other facts that follow.

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1242 BATTERY OR THREAT TO A DEPARTMENT OF REVENUE EMPLOYEE — § 940.205

Statutory Definition of the Crime

Section 940.205 of the Criminal Code of Wisconsin is violated by one who intentionally (causes) (threatens to cause) bodily harm to the (person) (family member) of any Department of Revenue employee[1] where at the time of the (act) (threat), the person knows[2] that the victim is a (Department of Revenue employee) (family member of a Department of Revenue employee), [the Department of Revenue employee is acting in an official capacity], [the (act) (threat) is in response to an action taken in the Department of Revenue employee's official capacity],[3] and there is no consent by the person (harmed) (threatened).

State's Burden of Proof

Before you may find the defendant guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following six elements were present.

Elements of the Crime That the State Must Prove

1. The defendant (caused) (threatened to cause) bodily harm to (name of victim).

   "Bodily harm" means physical pain or injury, illness, or any impairment of physical condition.[4]

   IF THE CASE INVOLVES CAUSING BODILY HARM, ADD THE FOLLOWING:

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["Cause" means that the defendant's act was a substantial factor in producing the bodily harm.][5]

IF THE CASE INVOLVES A THREAT, ADD THE FOLLOWING:

[A "threat" is an expression of intention to do harm and may be communicated orally, in writing, or by conduct. This element requires a true threat. "True threat" means that a reasonable person making the threat would foresee that a reasonable person would interpret the threat as a serious expression of intent to do harm. It is not necessary that the person making the threat have the ability to carry out the threat. You must consider all the circumstances in determining whether a threat is a true threat.][6]

2. (Name of victim) was a (Department of Revenue employee) (family member of a Department of Revenue employee).

   [For the purpose of this offense, a (e.g., child) is a family member.][7]

3. At the time of the (act) (threat) the defendant knew[8] that (name of victim) was a (Department of Revenue employee) (family member of a Department of Revenue employee).

4. [The Department of Revenue employee was acting in an official capacity at the time of the (act) (threat).] [The (act) (threat) was in response to an action taken in the Department of Revenue employee's official capacity.][9]

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Department of Revenue employees act in an official capacity when they perform duties that they are employed[10] to perform.[11] (The duties of a Department of Revenue employee include: _____.)[12]

5. The defendant (caused) (threatened to cause) bodily harm without the consent[13] of (name of victim).

6. The defendant acted intentionally. This requires that the defendant acted with the mental purpose to (cause) (threaten to cause) bodily harm.[14]

Deciding About Intent

You cannot look into a person's mind to find intent. Intent must be found, if found at all, from the defendant's acts, words, and statements, if any, and from all the facts and circumstances in this case bearing upon intent.

Jury's Decision

If you are satisfied beyond a reasonable doubt that all six elements of this offense have been proved, you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.

COMMENT

Wis JI-Criminal 1242 was originally published in 1994 and revised in 2004 to add a definition of "true threat." This revision was approved by the Committee in February 2008; it revised the definition of "official capacity."

Section 940.205 was created by 1985 Wisconsin Act 29.

1. Section 940.205 applies to offenses against the person or family of any department of revenue "official, employee or agent." The instruction refers to "employee" throughout, since that appears to be the most inclusive term.

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2. Neither the summary of the offense here nor the third element contain the alternative "or should have known" that is provided in the statute [see subsec. (2)(a)]. The Committee believed the phrase would be inapplicable in virtually all cases because a connection is required between the act or threat and the Department of Revenue employee's official capacity. That is, the threat or act must be committed either when the Department of Revenue employee is acting in an official capacity or in response to an action taken in the Department of Revenue employee's official capacity. In either situation, it may be confusing to instruct the jury on the "should have known" alternative. Of course, if that alternative fits the facts of the case, it should be added to the instruction.

3. One of the alternatives in brackets should be selected.

4. This is the definition provided in § 939.22(4).

5. The Committee concluded that the simple "substantial factor" definition of cause should be sufficient for most cases. Where there is evidence of more than one possible cause, something like the following might be added:

> There may be more than one cause of bodily harm. The act of one person alone might produce it, or the acts of two more persons might jointly produce it.

Also see Wis JI-Criminal 901, Cause.

6. This definition is based on one of the descriptions of "true threat" in State v. Perkins, 2001 WI 46, ¶28, 243 Wis.2d 141, 626 N.W.2d 762. Perkins held that a jury instruction for a threat to a judge in violation of § 940.203 was an incomplete statement of the law because it did not define "threat" as "true threat." This created an unacceptable risk that "the jury may have used the common definition of 'threat,' thereby violating the defendant's constitutional right to freedom of speech." 2001 WI 46, ¶43. The court stated: "The common definition of threat is an expression of an intention to inflict injury on another. The definition of threat for the purposes of a statute criminalizing threatening language is much narrower." 2001 WI 46, ¶43.

The following is the most complete definition of "true threat" offered by the court in Perkins:

> A true threat is a statement that a speaker would reasonably foresee that a listener would reasonably interpret as a serious expression of a purpose to inflict harm, as distinguished from hyperbole, jest, innocuous talk, expressions of political views, or other similarly protected speech. It is not necessary that the speaker have the ability to carry out the threat. In determining whether a statement is a true threat, the totality of the circumstances must be considered. 2001 WI 46, ¶29.

The Committee concluded that the definition in the instruction is equivalent in content and will be more understandable to the jury. In a case decided at the same time as Perkins, the court used a definition much like the one used in the instruction. See State v. A.S., 2001 WI 48, ¶23, 243 Wis.2d 173, 626 N.W.2d 712.

Perkins involved an orally communicated threat. The instruction is drafted more broadly to be applicable whether the threat is communicated orally, in writing, or by conduct.

7. Section 940.205(1) provides:

> "In this section, family member" means a parent, spouse, sibling, child, stepchild, foster child or treatment foster child.

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The applicable term should be inserted in the blank.

8. See note 2, supra.

9. One of the alternatives in brackets should be selected.

10. "Employed" is used here in the general sense of being engaged in the performance of a duty.

11. The definition of "official capacity" is taken from Wis JI-Criminal 915. See the Comment to that instruction for further discussion.

12. The duties, powers, or responsibilities of some public officers, officials, and employees are set forth in the Wisconsin Statutes or Administrative Code. When that is the case, the Committee suggests using the sentence in brackets and describing the duties in the blank. The Committee has concluded that the jury may be informed of the law that declares what a person's official duties are without running the risk of directing a verdict on an element of the crime. It is still for the jury to determine whether the person was performing the duty in the particular case. But see, State v. Jensen, 2007 WI App 256, ___ Wis.2d ___, 743 N.W.2d 468; and, State v. Schultz, 2007 WI App 257, ___ Wis.2d ___, 743 N.W.2d 823.

13. If definition of "without consent" is believed to be necessary, see Wis JI-Criminal 948 which provides an instruction based on the definition provided in § 939.22(48). That definition provides that "without consent" means "no consent in fact" or that consent was given because of fear, a claim of legal authority by the defendant, or misunderstanding.

14. "Intentionally" requires either mental purpose to cause the result or awareness that the conduct is practically certain to cause it. § 939.23(3). The Committee concluded that the mental purpose alternative is most likely to apply to this offense. See Wis JI-Criminal 923A and 923B.

"Intentionally" also generally requires knowledge of all facts necessary to make the conduct criminal which follow the word "intentionally" in the statute. § 939.23(3). This general rule appears to be countered by the drafting style of § 940.205 which divides the facts necessary to constitute the crime among several subsections of the statute. The Committee concluded that the knowledge requirement that usually accompanies the use of "intentionally" does not carry over to the three facts set forth in (2)(a), through (b) and (c). Sub. (2)(a) has its own mental state — "knows or should know" — and thereby breaks the connection between "intentionally" used in sub. (2) proper and the other facts that follow.

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1244 BATTERY OR THREAT TO A DEPARTMENT OF SAFETY AND PROFESSIONAL SERVICES OR DEPARTMENT OF WORKFORCE DEVELOPMENT EMPLOYEE — § 940.207

Statutory Definition of the Crime

Section 940.207 of the Criminal Code of Wisconsin is violated by one who intentionally (causes) (threatens to cause) bodily harm to the (person) (family member) of any Department of (Safety and Professional Services) (Workforce Development) employee[1] where at the time of the (act) (threat), the person knows[2] that the victim is a (department employee) (family member of a department employee), [the employee is acting in an official capacity], [the (act) (threat) is in response to an action taken in the employee's official capacity],[3] and there is no consent by the person (harmed) (threatened).

State's Burden of Proof

Before you may find the defendant guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following six elements were present.

Elements of the Crime That the State Must Prove

1. The defendant (caused) (threatened to cause) bodily harm to (name of victim).

   "Bodily harm" means physical pain or injury, illness, or any impairment of physical condition.[4]

   IF THE CASE INVOLVES CAUSING BODILY HARM, ADD THE FOLLOWING:

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["Cause" means that the defendant's act was a substantial factor in producing the bodily harm.][5]

IF THE CASE INVOLVES A THREAT, ADD THE FOLLOWING:

[A "threat" is an expression of intention to do harm and may be communicated orally, in writing, or by conduct. This element requires a true threat. "True threat" means that a reasonable person making the threat would foresee that a reasonable person would interpret the threat as a serious expression of intent to do harm. It is not necessary that the person making the threat have the ability to carry out the threat. You must consider all the circumstances in determining whether a threat is a true threat.][6]

2. (Name of victim) was a [an employee of] [a family member of an employee of] the Department of (Safety and Professional Services) (Workforce Development).

   [For the purpose of this offense, a (e.g., child) is a family member.][7]

3. At the time of the (act) (threat) the defendant knew[8] that (name of victim) was [an employee of] [a family member of an employee of] the Department of (Commerce) (Workforce Development).

4. [The employee was acting in an official capacity at the time of the (act) (threat).] [The (act) (threat) was in response to an action taken in the employee's official capacity.][9]

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Employees act in an official capacity when they perform duties that they are employed[10] to perform.[11] [The duties of a Department of (Safety and Professional Services) (Workforce Development) employee include: _____.][12]

5. The defendant (caused) (threatened to cause) bodily harm without the consent[13] of (name of victim).

6. The defendant acted intentionally. This requires that the defendant acted with the mental purpose to (cause) (threaten to cause) bodily harm.[14]

Deciding About Intent

You cannot look into a person's mind to find intent. Intent must be found, if found at all, from the defendant's acts, words, and statements, if any, and from all the facts and circumstances in this case bearing upon intent.

Jury's Decision

If you are satisfied beyond a reasonable doubt that all six elements of this offense have been proved, you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.

COMMENT

Wis JI-Criminal 1244 was originally published in 1994 and revised in 1998, 2004, and 2008. This revision was approved by the Committee in July 2011; it changed the reference from Department of Commerce to Department of Safety and Professional Services.

Section 940.207 was created by 1993 Wisconsin Act 86. A series of legislative changes affected the types of employees covered by the statute. As amended by 1997 Wisconsin Act 3, the statute applies to battery or threat to employees and family members of employees of the Department of Commerce and the Department of Workforce Development. 2011 Wisconsin Act 32 changed "Department of Commerce" to "Department of Safety and Professional Services."

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1. Section 940.207 applies to offenses against the person or family of any department "official, employee or agent." The instruction refers to "employee" throughout, since that appears to be the most inclusive term.

2. Neither the summary of the offense here nor the third element contain the alternative "or should have known" that is provided in the statute [see subsec. (2)(a)]. The Committee believed the phrase would be inapplicable in virtually all cases because a connection is required between the act or threat and the employee's official capacity. That is, the threat or act must be committed either when the employee is acting in an official capacity or in response to an action taken in the employee's official capacity. In either situation, it may be confusing to instruct the jury on the "should have known" alternative. Of course, if that alternative fits the facts of the case, it should be added to the instruction.

3. One of the alternatives in brackets should be selected.

4. This is the definition provided in § 939.22(4).

5. The Committee concluded that the simple "substantial factor" definition of cause should be sufficient for most cases. Where there is evidence of more than one possible cause, something like the following might be added:

> There may be more than one cause of bodily harm. The act of one person alone might produce it, or the acts of two more persons might jointly produce it.

Also see Wis JI-Criminal 901, Cause.

6. This definition is based on one of the descriptions of "true threat" in State v. Perkins, 2001 WI 46, ¶28, 243 Wis.2d 141, 626 N.W.2d 762. Perkins held that a jury instruction for a threat to a judge in violation of § 940.203 was an incomplete statement of the law because it did not define "threat" as "true threat." This created an unacceptable risk that "the jury may have used the common definition of 'threat,' thereby violating the defendant's constitutional right to freedom of speech." 2001 WI 46, ¶43. The court stated: "The common definition of threat is an expression of an intention to inflict injury on another. The definition of threat for the purposes of a statute criminalizing threatening language is much narrower." 2001 WI 46, ¶43.

The following is the most complete definition of "true threat" offered by the court in Perkins:

> A true threat is a statement that a speaker would reasonably foresee that a listener would reasonably interpret as a serious expression of a purpose to inflict harm, as distinguished from hyperbole, jest, innocuous talk, expressions of political views, or other similarly protected speech. It is not necessary that the speaker have the ability to carry out the threat. In determining whether a statement is a true threat, the totality of the circumstances must be considered. 2001 WI 46, ¶29.

The Committee concluded that the definition in the instruction is equivalent in content and will be more understandable to the jury. In a case decided at the same time as Perkins, the court used a definition much like the one used in the instruction. See State v. A.S., 2001 WI 48, ¶23, 243 Wis.2d 173, 626 N.W.2d 712.

Perkins involved an orally communicated threat. The instruction is drafted more broadly to be applicable whether the threat is communicated orally, in writing, or by conduct.

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7. Section 940.207(1) provides:

"In this section, family member" means a parent, spouse, sibling, child, stepchild, foster child or treatment foster child.

The applicable term should be inserted in the blank.

8. See note 2, supra.

9. One of the alternatives in brackets should be selected.

10. "Employed" is used here in the general sense of being engaged in the performance of a duty.

11. The definition of "official capacity" is taken from Wis JI-Criminal 915. See the Comment to that instruction for further discussion.

12. The duties, powers, or responsibilities of some public officers, officials, and employees are set forth in the Wisconsin Statutes or Administrative Code. When that is the case, the Committee suggests using the sentence in brackets and describing the duties in the blank. The Committee has concluded that the jury may be informed of the law that declares what a person's official duties are without running the risk of directing a verdict on an element of the crime. It is still for the jury to determine whether the person was performing the duty in the particular case. But see, State v. Jensen, 2007 WI App 256, 306 Wis.2d 572, 743 N.W.2d 468; and, State v. Schultz, 2007 WI App 257, 306 Wis.2d 598, 743 N.W.2d 823.

General powers and duties of the Department of Commerce are set forth in § 101.02, Wis. Stats.; those of the Department of Workforce Development are set forth in § 103.005, Wis. Stats.

13. If definition of "without consent" is believed to be necessary, see Wis JI-Criminal 948 which provides an instruction based on the definition provided in § 939.22(48). That definition provides that "without consent" means "no consent in fact" or that consent was given because of fear, a claim of legal authority by the defendant, or misunderstanding.

14. "Intentionally" requires either mental purpose to cause the result or awareness that the conduct is practically certain to cause it. § 939.23(3). The Committee concluded that the mental purpose alternative is most likely to apply to this offense. See Wis JI-Criminal 923A and 923B.

"Intentionally" also generally requires knowledge of all facts necessary to make the conduct criminal which follow the word "intentionally" in the statute. § 939.23(3). This general rule appears to be countered by the drafting style of § 940.207 which divides the facts necessary to constitute the crime among several subsections of the statute. The Committee concluded that the knowledge requirement that usually accompanies the use of "intentionally" does not carry over to the three facts set forth in (2)(a), through (b) and (c). Sub. (2)(a) has its own mental state — "knows or should know" — and thereby breaks the connection between "intentionally" used in sub. (2) proper and the other facts that follow.

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1245 BATTERY TO A COUNTY, CITY, VILLAGE, OR TOWN EMPLOYEE — § 940.208

Statutory Definition of the Crime

Section 940.208 of the Criminal Code of Wisconsin is violated by one who intentionally causes bodily harm to an employee of a city[1] where at the time of the act, the person knows[2] that the victim is a city employee, the employee is enforcing[3] a city[4] zoning ordinance, building code, or other construction law, rule, standard, or plan at the time of the act, the enforcement activity complies with any applicable law, ordinance, rule or notice requirement, and there is no consent by the person harmed.

State's Burden of Proof

Before you may find the defendant guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following seven elements were present.

Elements of the Crime That the State Must Prove

1. The defendant caused bodily harm to (name of victim).

   "Bodily harm" means physical pain or injury, illness, or any impairment of physical condition.[5]

   "Cause" means that the defendant's act was a substantial factor in producing the bodily harm.[6]

2. (Name of victim) was an employee of a city.

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3. At the time of the act the defendant knew[7] that (name of victim) was an employee of a city.

4. (Name of victim) was enforcing a city zoning ordinance, building code, or other construction law, rule, standard, or plan.

5. The enforcement complied with any applicable law, ordinance, rule or notice requirement.

6. The defendant caused bodily harm without the consent[8] of (name of victim).

7. The defendant acted intentionally. This requires that the defendant acted with the mental purpose to cause bodily harm.[9]

Deciding About Intent and Knowledge

You cannot look into a person's mind to find intent and knowledge. Intent and knowledge must be found, if found at all, from the defendant's acts, words, and statements, if any, and from all the facts and circumstances in this case bearing upon intent and knowledge.

Jury's Decision

If you are satisfied beyond a reasonable doubt that all seven elements of this offense have been proved, you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.

COMMENT

Wis JI-Criminal 1245 was approved by the Committee in July 2008.

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Section 940.208 was created by 2007 Wisconsin Act 193 [effective date: April 11, 2008].

The statute applies to harm caused to an employee of a county, city, village, or town, but the instruction is drafted for offenses against city employees in an effort to make a very long statute more manageable. The statute also applies where the act is in response to activity undertaken to enforce, or to inspect for the purpose of enforcing, a state, county, city, village, or town zoning ordinance, building code, or other construction law, rule, standard, or plan. Again, the instruction is drafted for offenses related to enforcement activities. If any of the other options are involved, the standard instruction will need to be modified.

1. The instruction is drafted for offenses against city employees, but the statute also applies to harm caused to an employee of a county, village, or town. If any of the other options are involved, the standard instruction will need to be modified.

2. Neither the summary of the offense here nor the third element contain the alternative "or should have known" that is provided in the statute [see sec. 940.208(1)]. The Committee believed the phrase would be inapplicable in virtually all cases because a connection is required between the act and the employee being engaged in enforcement or inspection activity. That is, the act must be committed either when the employee is engaged in enforcement or inspection activity or in response to enforcement or inspection activity. In either situation, it may be confusing to instruct the jury on the "should have known" alternative. Of course, if that alternative fits the facts of the case, it should be added to the instruction.

3. The instruction is drafted for cases involving bodily harm caused during enforcement activity, but the statute also applies where the harm is caused during an inspection for the purpose of enforcement or where harm is caused in response to activity undertaken to enforce. If any of the other options are involved, the standard instruction will need to be modified.

4. The instruction is drafted for enforcement of a city zoning ordinance, building code, etc., but the statute also applies to a state, county, village, or town zoning ordinance, building code, or other construction law, rule, standard, or plan. If any of the other options are involved, the standard instruction will need to be modified.

5. This is the definition provided in § 939.22(4).

6. The Committee concluded that the simple "substantial factor" definition of cause should be sufficient for most cases. Where there is evidence of more than one possible cause, something like the following might be added:

> There may be more than one cause of bodily harm. The act of one person alone might produce it, or the acts of two more persons might jointly produce it.

Also see Wis JI-Criminal 901, Cause.

7. See note 2, supra.

8. If definition of "without consent" is believed to be necessary, see Wis JI-Criminal 948 which provides an instruction based on the definition provided in § 939.22(48). That definition provides that "without consent" means "no consent in fact" or that consent was given because of fear, a claim of legal authority by the defendant, or misunderstanding.

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9. "Intentionally" requires either mental purpose to cause the result or awareness that the conduct is practically certain to cause it. § 939.23(3). The Committee concluded that the mental purpose alternative is most likely to apply to this offense. See Wis JI-Criminal 923A and 923B.

"Intentionally" also generally requires knowledge of all facts necessary to make the conduct criminal which follow the word "intentionally" in the statute. § 939.23(3). This general rule appears to be countered by the drafting style of § 940.208 which divides the facts necessary to constitute the crime among several subsections of the statute. The Committee concluded that the knowledge requirement that usually accompanies the use of "intentionally" does not carry over to the element set forth in (1). Sub. (1) has its own mental state — "knows or should know" — and thereby breaks the connection between "intentionally" used in the introductory sentence of the statute.

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1246 MAYHEM — § 940.21

Statutory Definition of the Crime

Mayhem, as defined in § 940.21 of the Criminal Code of Wisconsin, is committed by one who cuts or mutilates the tongue, eye, ear, nose, lip, limb, or other bodily member of another with intent to disable or disfigure that person.

State's Burden of Proof

Before you may find the defendant guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following three elements were present.

Elements of the Crime That the State Must Prove

1. The defendant cut or mutilated (the tongue) (the eye) (the ear) (the nose) (the lip) (a limb) (any bodily part)[1] of (name of victim).

2. The cutting or mutilation caused great bodily harm to (name of victim).[2]

   "Cause" means that the defendant's conduct was a substantial factor[3] in producing great bodily harm.

   "Great bodily harm" means injury which creates a substantial risk of death, or which causes serious permanent disfigurement, or which causes a permanent or protracted loss or impairment of the function of any bodily member or organ, or other serious bodily injury.[4]

3. The defendant intended to disable or disfigure (name of victim).

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This requires that the defendant had the mental purpose to disable or disfigure (name of victim) or was aware that (his) (her) conduct was practically certain to disable or disfigure (name of victim).

Deciding About Intent

You cannot look into a person's mind to find intent. Intent must be found, if found at all, from the defendant's acts, words, and statements, if any, and from all the facts and circumstances in this case bearing upon intent.

Jury's Decision

If you are satisfied beyond a reasonable doubt that all three elements of mayhem have been proved, you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.

COMMENT

Until 1994, violations of § 940.21, Mayhem, were addressed by Wis JI-Criminal 1230, which was originally published in 1969 and revised in 1982, 1987, and 1992. That instruction was revised and republished as Wis JI-Criminal 1246 in 1994 and revised in 2005. This revision was approved by the Committee in June 2008 and involved revising the definition of the first element and adding footnote 1.

The second element of the instruction, requiring the causing of great bodily harm, was added in 1982 and reflects the holding in State v. Kirby, 86 Wis.2d 292, 272 N.W.2d 113 (Ct. App. 1978). Kirby held that "causing great bodily harm" was an element of mayhem, even thought it was not expressly stated in the statute. Kirby also held that injury by conduct regardless of life [which would be "reckless injury" under § 940.23 under current law] and endangering safety by conduct regardless of life [which would be "recklessly endangering safety" under § 941.30 under current law] were lesser included offenses of mayhem. The Committee revised the instruction in September 1982 to comply with the Kirby decision.

In July 1982, the Wisconsin Court of Appeals (District I) decided State v. Cole (not published) and held that the 1969 version of Wis JI-Criminal 1230, without "great bodily harm," was a proper statement of the law. Though written by the author of Kirby, the Cole decision did not mention that case or acknowledge the great bodily harm issue.

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On January 27, 1987, the Wisconsin Court of Appeals (District IV) decided State v. Webie. The defendant appealed his conviction for endangering safety by conduct regardless of life. The conviction was reversed because the court found that "endangering safety. . ." was not a lesser included offense of mayhem, the crime with which Webie was originally charged. This result required expressly overruling Kirby on the lesser included offense issue. Webie also noted that "we need not consider whether mayhem continues to incorporate the unexpressed great bodily harm requirement." Though it reversed a previous decision and was recommended for publication, Webie was ordered not published on April 2, 1987.

In the meantime, Cole (see State v. Cole, above) had gone to federal court, claiming that the failure to instruct on an element (great bodily harm) of the crime (mayhem) deprived him of due process. The U.S. Court of Appeals for the 7th Circuit granted habeas corpus relief in Cole v. Young, 817 F.2d 412 (7th Cir. 1987). The court reviewed Kirby, Cole, and Webie and decided that state law made great bodily harm an element of mayhem. That being the case, the court found a constitutional violation in the failure to instruct on that element.

Since it is the only published opinion, Kirby remains the law of the state. While at least one district of the Wisconsin Court of Appeals disagrees with it, that disagreement did not manifest itself in a published opinion. Thus, Kirby must be followed until it is officially overruled.

In State v. Quintana, 2008 WI 33, ¶73, 308 Wis.2d 615, 748 N.W.2d 447, (see note 1, below) the court acknowledged the above discussion but noted that "the legislature has not acted to correct any possible misinterpretation that arose out of the 1978 Kirby decision or its progeny. The inclusion of great bodily harm as an element supports our conclusion that the legislature sought a broad definition of 'other bodily member' as great bodily harm is not limited to specific parts of the body."

1. In State v. Quintana, 2008 WI 33, 308 Wis.2d 615, 748 N.W.2d 447, the court held that the term "other bodily member" in the mayhem statute is to be broadly construed and includes the forehead:

> ¶90 . . . . We conclude that the forehead qualifies as an "other bodily member" under Wis. Stat. § 940.21, Mayhem. Wisconsin's mayhem statute seeks to punish those who intentionally disable or disfigure another person's bodily member. The manner in which the legislature used the phrase, "other bodily member," requires that we give that phrase a broad construction. If "other bodily member" were to be narrowly construed, the construction would produce absurd results, and the purpose of the statute would easily be defeated. Because the legislature intended the phrase "other bodily member" to be construed broadly rather than narrowly, the phrase "other bodily member" in the mayhem statute encompasses all bodily parts, including a person's forehead. The application of the mayhem statute is limited by the need to prove that a person specifically intended to disable or disfigure.

In light of this decision, the Committee decided that list of alternatives in the first element should be revised to include a general reference to "any bodily part." In addition to the paragraph quoted above, see ¶33: "In short, 'other bodily member' encompasses all bodily parts."

2. Kirby v. State, 86 Wis.2d 292, 301, 272 N.W.2d 113 (Ct. App. 1978):

> Although at common law mayhem required proof of mutilation or dismemberment that affected one's combat ability, the statutory enactments creating the crime have not required such extensive

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mutilation or disfigurement. Nonetheless, "cuts or mutilates" as used in the statute requires proof of an act of greater severity than a mere nick with a knife. We believe that "cutting or mutilation," a statutory element of mayhem, requires an injury that constitutes "great bodily harm" as interpreted in LaBarge [74 Wis.2d 327, 246 N.W.2d 794 (1976)] and required as an element of injury by conduct regardless of life.

Also see LaFave and Scott, Criminal Law (1972) at 614-17.

3. The Committee has concluded that the simple "substantial factor" definition of cause should be sufficient for most cases. If additional definition is necessary, see note 5, Wis JI-Criminal 1185, and Wis JI-Criminal 901, Cause.

4. See Wis JI-Criminal 914 for a complete discussion of "great bodily harm."

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1248 SEXUAL EXPLOITATION BY THERAPIST — § 940.22

Statutory Definition of the Crime

Sexual exploitation by a therapist, as defined in § 940.22 of the Criminal Code of Wisconsin, is committed by one who is or holds himself or herself out to be a therapist and who intentionally has sexual contact with a patient or client during any ongoing therapist-patient or therapist-client relationship.

State's Burden of Proof

Before you may find the defendant guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following four[1] elements were present.

Elements of the Crime That the State Must Prove

1. The defendant (was) (held (himself) (herself) out to be) a therapist.

   "Therapist"[2] means a person who performs or purports to perform psychotherapy.[3]

   To be considered a therapist, it is not necessary that a person be licensed or certified by the state.

   ADD THE FOLLOWING IF THERE IS EVIDENCE THAT THE DEFENDANT IS A MEMBER OF A PROFESSION LISTED IN § 940.22(1)(I):

   ["Therapist" may include a _____ if that person performs or purports to perform psychotherapy.][4]

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2. (Name of victim) was a (patient) (client) of the defendant.

3. The defendant intentionally had sexual contact with (name of victim).

   REFER TO WIS JI-CRIMINAL 1200A FOR DEFINITION OF "SEXUAL CONTACT" AND INSERT THE APPROPRIATE DEFINITION HERE.

4. The sexual contact occurred during an ongoing therapist-patient or therapist-client relationship.

   It is not required that the sexual contact took place during an actual treatment session, consultation, interview, or examination.[5] It is sufficient if a therapist-patient or therapist-client relationship existed between the defendant and (name of victim) when the sexual contact occurred.

   You should consider all the circumstances in determining whether a therapist-patient or therapist-client relationship existed.[6]

   Whether or not (name of victim) consented to sexual contact is not an issue in this case.[7]

Deciding About Intent and Knowledge

You cannot look into a person's mind to find intent or knowledge. Intent and knowledge must be found, if found at all, from the defendant's acts, words, and statements, if any, and from all the facts and circumstances in this case bearing upon intent and knowledge.

Jury's Decision

If you are satisfied beyond a reasonable doubt that all four elements of this offense have been proved, you should find the defendant guilty.

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If you are not so satisfied, you must find the defendant not guilty.

COMMENT

Wis JI-Criminal 1248 was originally published in 1987 and revised in 1992, 1996 and 2005. This revision was approved by the Committee in October 2005.

The 2006 revision changed the definition of "therapist" in the first element, in part to reflect the decision in State v. Draughon, 2005 WI App 162, 285 Wis.2d 633, 702 N.W.2d 412. The court of appeals held that "the jury instruction addressing Draughon's status as a 'therapist' under § 940.22(1)(I) was error." The trial court followed the format recommended by Wis JI-Criminal 1248 [© 1996], which provided as follows for the first element: "'Therapist'" means a person who performs psychotherapy. It includes a (identify type of therapist)." The court of appeals concluded that stating "It includes a member of the clergy" as called for by Wis JI-Criminal 1248 "lead[s] to the faulty conclusion that by definition, clergy members perform psychotherapy." Because "the instruction given never directed the jury to make an independent, beyond-a-reasonable-doubt decision as to whether Draughon performed or purported to perform psychotherapy . . . its omission is constitutional error." Draughon, ¶14.

This instruction was revised in 2005 to reflect the decision of the Wisconsin Supreme Court in State v. DeLain, 2005 WI 52, 280 Wis.2d 51, 695 N.W.2d 484. The court held "that it is the totality of the circumstances . . . that determines whether there was an ongoing therapist-patient relationship when sexual contact occurred." DeLain, ¶24. See footnote 5, below. The DeLain decision also "disavow[ed] the court of appeals discussion of 'intentionally.'" Id. at ¶24. The court of appeals had concluded that because § 940.22 used the word "intentionally" it required that the defendant know that the victim was a patient and know that the defendant and the victim had an ongoing therapist-patient relationship. State v. DeLain, 2004 WI App 79, 272 Wis.2d 356, 679 N.W.2d 562, ¶¶10-11, citing § 939.23(3). The Committee had revised the instruction to add an element embodying this knowledge requirement but deleted it in response to the supreme court decision.

This instruction provides for inserting a definition of "sexual contact" as provided in Wis JI-Criminal 1200A. That definitional material was formerly included in the text of each offense instruction. When a new alternative was added to the statutory definition of sexual contact by 1995 Wisconsin Act 69, the Committee decided to modify its original approach by providing a separate instruction that included all alternatives for definition of the term. The Committee believes that this will be more convenient to the users of the instructions, making it easier to prepare an instruction that is tailored to the facts of the case.

1. State v. DeLain, 2005 WI 52, 280 Wis.2d 51, 695 N.W.2d 484, the Wisconsin Supreme Court stated that this offense has three elements. ¶9. The instruction provides for four elements, using a separate element for the victim's status as a patient or client of the defendant. See element 2. No change in substance is intended.

2. Section 940.22(1)(I) provides the following definition of "therapist":

"Therapist" means a physician, psychologist, social worker, marriage and family therapist, professional counselor, nurse, chemical dependency counselor, member of the clergy or other

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person, whether or not licensed or certified by the state, who performs or purports to perform psychotherapy.

The Committee concluded that the instruction would be more clear if it provided a general definition of the term ("a person who performs or purports to perform psychotherapy") and then provided for a statement, to be used where applicable, that one of the professions named in subsec. (1)(I) may be included in the definition. See State v. Draughon, 2005 WI App 162, discussed in the first paragraph of the Comment, and note 4, below.

3. "Psychotherapy" should be defined if necessary. Section 940.22(1)(d) refers to the definition in § 455.01(6), which reads as follows:

"Psychotherapy" means the use of learning, conditioning methods and emotional reactions in a professional relationship to assist persons to modify feelings, attitudes and behaviors which are intellectually, socially or emotionally maladjustive or ineffectual.

4. If the case involves one of the "therapists" listed in § 940.22(1)(I), insert the name in the blank provided. See note 2, supra.

5. The requirement that the sexual contact occur "during an ongoing therapist-patient or therapist-client relationship" was added by 1985 Wisconsin Act 275. The same act eliminated the requirement that the contact occur during any particular examination, interview, etc.

A teacher who engages in informal counseling with students is not engaged as a professional therapist, even if the teacher has a psychology degree. "[T]he only reasonable meaning of the requirement for an ongoing therapist-patient/client relationship in the criminal statute is that of a professional therapist-patient/client relationship." State v. Ambrose, 196 Wis.2d 768, 777, 540 N.W.2d 208 (Ct. App. 1995).

6. This statement is based on State v. DeLain, 2005 WI 52, 280 Wis.2d 51, 695 N.W.2d 484, where the Wisconsin Supreme Court held "that it is the totality of the circumstances . . . that determines whether there was an ongoing therapist-patient relationship when sexual contact occurred." DeLain, ¶24. The decision then refers to factors that may be relevant to this determination, though not dispositive: a defendant's state of mind; a secret unilateral action of a patient; the explicit remarks of one party to the other regarding the status of the relationship; how much time has gone by since the last therapy session; how close together the therapy sessions had been to each other; the age of the patient; the particular vulnerabilities experienced by the patient as a result of his or her mental health issues; and, the ethical obligations of the therapist's profession [referring to sections in the Wisconsin Administrative Code: § Psy 5.01(31), § MPSW 20.02(21), and § Psy 5.01(14)(a)-(b) and (c)1-7]. DeLain, ¶24.

The DeLain decision also "disavow[ed] the court of appeals discussion of 'intentionally.'" Id. at ¶24. The court of appeals had concluded that because § 940.22 used the word "intentionally" it required that the defendant know that the victim was a patient and know that the defendant and the victim had an ongoing therapist-patient relationship. State v. DeLain, 2004 WI App 79, 272 Wis.2d 356, 679 N.W.2d 562, ¶¶10-11, citing § 939.23(3).

7. "Without consent" is not included as an element in the statute. To avoid possible speculation or confusion, the Committee concluded that the jury should be specifically informed that consent is not an issue.

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1250 FIRST DEGREE RECKLESS INJURY — § 940.23(1)

Statutory Definition of the Crime

First degree reckless injury, as defined in § 940.23(1) of the Criminal Code of Wisconsin, is committed by one who recklessly causes great bodily harm to another human being under circumstances that show utter disregard for human life.

State's Burden of Proof

Before you may find the defendant guilty of first degree reckless injury, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following three elements were present.

Elements of the Crime That the State Must Prove

1. The defendant caused great bodily harm to (name of victim).

   "Cause" means that the defendant's act was a substantial factor in producing great bodily harm.[1]

   "Great bodily harm" means injury which creates a substantial risk of death, or which causes serious permanent disfigurement, or which causes a permanent or protracted loss or impairment of the function of any bodily member or organ, or other serious bodily injury.[2]

2. The defendant caused great bodily harm by criminally reckless conduct.

   "Criminally reckless conduct" means:[3]

   - the conduct created a risk of death or great bodily harm to another person; and

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- the risk of death or great bodily harm was unreasonable and substantial; and
- the defendant was aware that (his) (her) conduct created the unreasonable and substantial risk of death or great bodily harm.[4]

3. The circumstances of the defendant's conduct showed utter disregard[5] for human life.

In determining whether the circumstances of the conduct showed utter disregard for human life, consider these factors: what the defendant was doing; why the defendant was engaged in that conduct; how dangerous the conduct was; how obvious the danger was; whether the conduct showed any regard for life;[6] and, all other facts and circumstances relating to the conduct.

ADD THE FOLLOWING IF EVIDENCE OF THE DEFENDANT'S AFTER-THE-FACT CONDUCT HAS BEEN ADMITTED.[7]

[Consider also the defendant's conduct after the great bodily harm to the extent that it helps you decide whether or not the circumstances showed utter disregard for human life at the time the great bodily harm occurred.]

Jury's Decision

If you are satisfied beyond a reasonable doubt that all three elements of this offense were present, you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.

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COMMENT

Wis JI-Criminal 1250 was originally published in 1962 and revised in 1989, 2002, and 2012 and 2015. The 2012 revision added the material at footnote 7. The 2015 revision revised footnote 4 to reflect 2013 Wisconsin Act 307. The Comment was updated in April 2019.

This instruction is for a violation of § 940.23(1), as amended by 1987 Wisconsin Act 399 as part of the revision of the homicide statutes. The amended statute applies to offenses committed on or after January 1, 1989. For a brief overview of the homicide revision, see the Introductory Comment at Wis JI Criminal 1000. A comprehensive outline and discussion of the changes can be found in "The Importance of Clarity in the Law of Homicide: The Wisconsin Revision," by Walter Dickey, David Schultz, and James L. Fullin, Jr., 1989 Wisconsin Law Review 1325.

First degree reckless injury replaces what was called "injury by conduct regardless of life" under prior law.

The homicide revision also created § 940.23(2), Second Degree Reckless Injury. See Wis JI Criminal 1252.

In State v. Kloss, 2019 WI App 13, 386 Wis.2d 314, 925 N.W.2d 563, the court of appeals held that solicitation of first-degree reckless injury is a crime and that solicitation of first degree recklessly endangering safety is a lesser included offense thereof. [**Reporter's Note:** The Wisconsin Supreme Court granted review in Kloss on June 17, 2019.]

1. The Committee has concluded that the simple "substantial factor" definition of cause should be sufficient for most cases. Where there is evidence of more than one possible cause, something like the following might be added:

> There may be more than one cause of death. The act of one person alone might produce it, or the acts of two or more persons might jointly produce it.

Also see, Wis JI-Criminal 901 Cause.

2. See § 939.22(14) and Wis JI-Criminal 914.

3. "Criminal recklessness" is defined as follows in § 939.24(1):

> . . . 'criminal recklessness' means that the actor creates an unreasonable and substantial risk of death or great bodily harm to another human being and the actor is aware of that risk.

The Judicial Council Note to § 939.24, 1987 Senate Bill 191, explains that "[r]ecklessness requires both the creation of an objectively unreasonable and substantial risk of human death or great bodily harm and the actor's subjective awareness of that risk."

4. The statutory definition of "recklessness" clarifies that subjective awareness of the risk is required. That raises the possibility that intoxication could, as a factual matter, negate awareness of the risk. For that reason, the original definition of recklessness provided that if voluntary intoxication

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prevented the actor from being aware of the risk, it was not a defense. This rule was set forth in § 939.24(3):

> (3) A voluntarily produced intoxicated or drugged condition is not a defense to liability for criminal recklessness if, had the actor not been in that condition, he or she would have been aware of creating an unreasonable and substantial risk of death or great bodily harm to another human being.
>
> The Judicial Council Note to subsection (3) explains it as follows:
>
> Subsection (3) continues the present rule that a voluntarily produced intoxicated or drugged condition is not a defense to liability for criminal recklessness. Ameen v. State, 51 Wis.2d 175, 185, 186 N.W.2d 206 (1971). Patterned on s. 2.08 of the model penal code, it premises liability on whether the actor would have been aware if not in such condition of the risk of death or great bodily harm. The commentaries to s. 2.08, model penal code, state the rationale of this rule in extended fashion.

Note to § 939.24(3), 1987 Senate Bill 191.

Section 939.42, the statute codifying both voluntary and involuntary intoxication defenses, was revised by 2013 Wisconsin Act 307 [effective date: April 18, 2014]. Reference to voluntary intoxication was eliminated; as amended, the statute refers only to involuntary intoxication. Act 307 also repealed former sub. (3) of § 939.24, thus getting rid of the special rule excluding voluntary intoxication as a defense to the "aware of the risk" element. For cases arising before the effective date of Act 307, the suggestion included in the previous version of this Comment would still apply: "In a case where there is evidence of intoxication, it may be helpful to advise the jury of the rule provided in subsection (3). The Committee concluded that simply reading the statute is the best way to provide the necessary information."

5. "Under circumstances which show utter disregard for human life" is the factor that distinguishes this offense from second degree reckless homicide. The Judicial Council Note to § 940.02 provides that it is intended to reflect the substance of case law defining "conduct evincing a depraved mind, regardless of human life":

> First-degree reckless homicide is analogous to the prior offense of 2nd-degree murder. The concept of "conduct evincing a depraved mind, regardless of human life" has been a difficult one for modern juries to comprehend. To avoid the mistaken connotation that a clinical mental disorder is involved, the offense has been recodified as aggravated reckless homicide. The revision clarifies that a subjective mental state, i.e., criminal recklessness, is required for liability. See s. 939.24, stats. The aggravating element, i.e., circumstances which show utter disregard for human life, is intended to codify judicial interpretations of "conduct evincing a depraved mind, regardless of human life." State v. Dolan, 44 Wis.2d 68, 170 N.W.2d 822 (1969); State v. Weso, 60 Wis.2d 404, 210 N.W.2d 442 (1973).
>
> Note to § 940.02, 1987 Senate Bill 191.

The Dolan and Weso cases do not contain significant definitions themselves but rather cite with approval Wis JI-Criminal 1345 (© 1962), which used the phrase "utter lack of concern for the life and safety of another."

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The Committee concluded that no further definition of the phrase "utter disregard" was necessary. The jury should be able to give the phrase a common sense meaning in determining whether the conduct is such that it amounts to aggravated reckless homicide offense.

A phrase with essentially the same meaning is used in the Model Penal Code. Section 2.02(1)(b) provides that criminal homicide constitutes murder when it is "committed recklessly under circumstances manifesting extreme indifference to the value of human life." The Commentary to § 2.02(1)(b) explains that whether conduct demonstrates "extreme indifference" "is not a question . . . that can be further clarified." Attempts to explain the term by reference to common law concepts, says the Commentary, suffer from lack of clarity, and "extreme indifference" is simpler and more direct than other attempts to reformulate the common law.

The Judicial Council Committee considered the Model Penal Code formulation but opted for "utter disregard," apparently on the grounds that it would more clearly tie in with prior case law which could be referred to for examples of the kind of conduct that is intended to be covered by first degree reckless homicide under the revised statutes.

For discussions of "conduct evincing a depraved mind, regardless of human life" under prior law, see, e.g., Balistreri v. State, 83 Wis.2d 440, 265 N.W.2d 290 (1978); Wagner v. State, 76 Wis.2d 30, 250 N.W.2d 331 (1977); and Seidler v. State, 64 Wis.2d 456, 219 N.W.2d 320 (1974). In State v. Geske, 2012 WI App 15, 339 Wis.2d 170, 810 N.W.2d 226, the defendant, convicted of first degree reckless homicide, challenged the sufficiency of the evidence on the "utter disregard" element. Relying on the Wagner and Balistreri cases, she argued that her swerve just before the collision showed some regard for human life. The court held that the evidence of the swerve had to be considered in the context of all the circumstances: "A legally intoxicated person driving over eighty miles per hour through the city could not reasonably expect to avoid any collision by swerving at the last moment. Given the totality of the situation here, Geske's ineffectual swerve failed to demonstrate a regard for human life." ¶18.

The meaning of "utter disregard for human life" was discussed in State v. Jensen, 2000 WI 84, 236 Wis.2d 521, 613 N.W.2d 170. The court relied on Weso, supra, to conclude that the phrase identifies an objective standard. The court noted:

> Although "utter disregard for human life" clearly has something to do with mental state, it is not a sub-part of the intent element of this crime, and, as such, need not be subjectively proven. It can be (and often is) proven by evidence relating to the defendant's subjective state of mind-by the defendant's statements, for example, before, during and after the crime. But it can also be established by evidence of heightened risk, because of special vulnerabilities of the victim, for example, or evidence of a particularly obvious, potentially lethal danger. However it is proven, the element of utter disregard for human life is measured objectively, on the basis of what a reasonable person in the defendant's position would have known. ¶17.

The Committee considered changing the instruction in response to Jensen, but concluded that the text accurately conveys a standard consistent with the decision. Jensen concluded that the standard could be understood and applied "without categorical rules being laid down by appellate courts on sufficiency of the evidence challenges." ¶29. The Committee concluded that the instruction could also be properly applied without attempting to articulate "categorical rules."

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Also see, State v. Edmunds, 229 Wis.2d 67, 598 N.W.2d 290 (Ct. App. 1999), which, like Jensen, reviewed the application of the "utter disregard . . ." standard to a "shaken baby" case.

6. All the circumstances relating to the defendant's conduct should be considered in determining whether that conduct shows "utter disregard" for human life. These circumstances would include facts relating to the possible provocation of the defendant:

> Under prior law, adequate provocation mitigated 2nd-degree murder to manslaughter. State v. Hoyt, 21 Wis.2d 284, 124 N.W.2d 47 (1965). Under this revision, the analogs of those crimes, i.e., first-degree reckless and 2nd-degree intentional homicide, carry the same penalty; thus mitigation is impossible. Evidence of provocation will usually be admissible in prosecutions for crimes requiring criminal recklessness, however, as relevant to the reasonableness of the risk (and, in prosecutions under this section, whether the circumstances show utter disregard for human life). Since provocation is integrated into the calculus of recklessness, it is not an affirmative defense thereto and the burdens of production and persuasion stated in s. 940.01(3), stats., are inapplicable.
>
> Judicial Council Note to § 940.02, 1987 Senate Bill 191.

7. This material was added in 2011 in response to the decision of the Wisconsin Supreme Court in State v. Burris, 2011 WI 32, 333 Wis.2d 87, 797 N.W.2d 430. The decision reversed a decision of the court of appeals which had reversed Burris' conviction for 1st degree reckless injury. The court of appeals reversed because the trial court's response to a jury question about whether after-the-incident conduct should be considered in evaluating whether "the circumstances show utter disregard for human life" was potentially misleading. The supreme court held:

> ¶7 We conclude that, in an utter disregard analysis, a defendant's conduct is not, as a matter of law, assigned more or less weight whether the conduct occurred before, during, or after the crime. We hold that, when evaluating whether a defendant acted with utter disregard for human life, a fact-finder should consider any relevant evidence in regard to the totality of the circumstances.

The court also held, that under the facts of the Burris case, "the supplemental instruction did not mislead the jury into believing that it could not consider Burris's relevant after-the-fact conduct in its determination on utter disregard for human life." ¶8.

The court recommended that the Committee address this issue in the jury instructions:

> ¶64 . . . [S]upplemental instructions such as the one given here, taken out of context from Jensen, do have the potential to be confusing. Thus, we recommend that the Criminal Jury Instruction Committee, in its comments to the "first-degree reckless" offense instructions, Wis JI-Criminal 1016-22, 1250, and the utter disregard for human life instruction, Wis JI-Criminal 924A, advise against taking certain language directly from utter disregard cases such as Jensen without providing the necessary context to fully explain the proper inquiry. Additionally, we recommend that the Committee consider revising these instructions to more explicitly direct the jury that, in its utter disregard for human life consideration, it should consider the totality of the circumstances including any relevant evidence regarding a defendant's conduct before, during, and after the crime.

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The addition to the instruction referring to after-the-fact conduct is intended to address the court's suggestions. The committee decided it was not necessary to include a reference to conduct before or during the act because the paragraph immediately preceding the addition calls the jury's attention to "what the defendant was doing" and "all the other facts and circumstances relating to the conduct." Juries will rarely have questions about the relevance of conduct before and during the act but they may have questions about the after-fact-conduct, as the jury in the Burris case did.

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1252 SECOND DEGREE RECKLESS INJURY — § 940.23(2)

Statutory Definition of the Crime

Second degree reckless injury, as defined in § 940.23(2) of the Criminal Code of Wisconsin, is committed by one who recklessly causes great bodily harm to another human being.

State's Burden of Proof

Before you may find the defendant guilty of second degree reckless injury, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following two elements were present.

Elements of the Crime That the State Must Prove

1. The defendant caused great bodily harm to (name of victim).

   "Cause" means that the defendant's act was a substantial factor in producing great bodily harm.[1]

   "Great bodily harm" means serious bodily injury.[2] [Injury which creates a substantial risk of death, or which causes serious permanent disfigurement, or which causes a permanent or protracted loss or impairment of the function of any bodily member or organ, or other serious bodily injury is great bodily harm.]

2. The defendant caused great bodily harm by criminally reckless conduct.

   "Criminally reckless conduct" means:[3]

   - the conduct created a risk of death or great bodily harm to another person; and

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- the risk of death or great bodily harm was unreasonable and substantial; and

- the defendant was aware that (his) (her) conduct created the unreasonable and substantial risk of death or great bodily harm.[4]

Jury's Decision

If you are satisfied beyond a reasonable doubt that both elements of this offense were present, you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.

COMMENT

Wis JI-Criminal 1252 was originally published in 1989 and revised in 2002. This revision was approved by the Committee in March 2015; it revised footnote 4 to reflect 2013 Wisconsin Act 307.

This instruction is for a violation of § 940.23(2), created by 1987 Wisconsin Act 399 as part of the revision of the homicide statutes. The statute applies to offenses committed on or after January 1, 1989. For a brief overview of the homicide revision, see the Introductory Comment at Wis JI-Criminal 1000. A comprehensive outline and discussion of the changes can be found in "The Importance of Clarity in the Law of Homicide: The Wisconsin Revision," by Walter Dickey, David Schultz, and James L. Fullin, Jr., 1989 Wisconsin Law Review 1325.

1. The Committee has concluded that the simple "substantial factor" definition of cause should be sufficient for most cases. Where there is evidence of more than one possible cause, something like the following might be added immediately preceding the sentence in the instruction beginning with "before":

> There may be more than one cause of death. The act of one person alone might produce it, or the acts of two or more persons might jointly produce it.

Also see, Wis JI-Criminal 901 Cause.

2. The Committee has concluded that defining great bodily harm as "serious bodily injury" is sufficient in most cases. The material in brackets is the remainder of the definition found in § 939.22(14) and should be used as needed. The definition was changed by 1987 Wisconsin Act 399 to substitute "substantial risk" for "high probability" in the phrase "substantial risk of death." See Wis JI-Criminal 914.

Whether or not an injury suffered amounts to "great bodily harm" is an issue of fact for the jury to resolve. See Flores v. State, 76 Wis.2d 50, 250 N.W.2d 227 720 (1976).

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3. "Criminal recklessness" is defined as follows in § 939.24(1):

> . . . 'criminal recklessness' means that the actor creates an unreasonable and substantial risk of death or great bodily harm to another human being and the actor is aware of that risk.

The Judicial Council Note to § 939.24, 1987 Senate Bill 191, explains that "[r]ecklessness requires both the creation of an objectively unreasonable and substantial risk of human death or great bodily harm and the actor's subjective awareness of that risk."

4. The statutory definition of "recklessness" clarifies that subjective awareness of the risk is required. That raises the possibility that intoxication could, as a factual matter, negate awareness of the risk. For that reason, the original definition of recklessness provided that if voluntary intoxication prevented the actor from being aware of the risk, it was not a defense. This rule was set forth in § 939.24(3):

> (3) A voluntarily produced intoxicated or drugged condition is not a defense to liability for criminal recklessness if, had the actor not been in that condition, he or she would have been aware of creating an unreasonable and substantial risk of death or great bodily harm to another human being.

The Judicial Council Note to subsection (3) explains it as follows:

> Subsection (3) continues the present rule that a voluntarily produced intoxicated or drugged condition is not a defense to liability for criminal recklessness. Ameen v. State, 51 Wis.2d 175, 185, 186 N.W.2d 206 (1971). Patterned on s. 2.08 of the model penal code, it premises liability on whether the actor would have been aware if not in such condition of the risk of death or great bodily harm. The commentaries to s. 2.08, model penal code, state the rationale of this rule in extended fashion.

Note to § 939.24(3), 1987 Senate Bill 191.

Section 939.42, the statute codifying both voluntary and involuntary intoxication defenses, was revised by 2013 Wisconsin Act 307 [effective date: April 18, 2014]. Reference to voluntary intoxication was eliminated; as amended, the statute refers only to involuntary intoxication. Act 307 also repealed former sub. (3) of § 939.24, thus getting rid of the special rule excluding voluntary intoxication as a defense to the "aware of the risk" element. For cases arising before the effective date of Act 307, the suggestion included in the previous version of this Comment would still apply: "In a case where there is evidence of intoxication, it may be helpful to advise the jury of the rule provided in subsection (3). The Committee concluded that simply reading the statute is the best way to provide the necessary information.

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1255 STRANGULATION AND SUFFOCATION — § 940.235

Statutory Definition of the Crime

Section 940.235 of the Criminal Code of Wisconsin is violated by one who intentionally impedes the normal breathing or circulation of blood by applying pressure on the throat or neck or by blocking the nose or mouth of another person.

State's Burden of Proof

Before you may find the defendant guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following two elements were present.

Elements of the Crime That the State Must Prove

1. The defendant impeded the normal breathing or circulation of blood by applying pressure on the throat or neck or by blocking the nose or mouth of (name of victim).
2. The defendant did so intentionally.

   This requires that the defendant acted with the mental purpose to impede normal breathing or circulation of blood or was aware that (his) (her) conduct was practically certain to cause that result.[1]

Deciding About Intent

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You cannot look into a person's mind to find intent. Intent must be found, if found at all, from the defendant's acts, words, and statements, if any, and from all the facts and circumstances in this case bearing upon intent.

Jury's Decision

If you are satisfied beyond a reasonable doubt that both elements of this offense have been proved, you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.

COMMENT

Wis JI-Criminal 1255 was originally published in 2009. This revision was approved by the Committee in July 2014; it added to the Comment.

This instruction addresses violations of § 940.235, created by 2007 Wisconsin Act 127 [effective date: April 4, 2008].

Section 940.235(2) provides that this offense is a Class G felony if "the actor has a previous conviction under this section or a previous conviction for a violent crime, as defined in s. 939.632(1)(e)1." Violent crimes defined in s. 939.632(1)(e)1. are felonies under 34 specified statutes. The Committee concluded that this penalty-increasing fact need not be submitted to the jury because it relates solely to prior convictions. See Apprendi v. New Jersey, 530 U.S. 466, 490 (2000): "Other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." (Emphasis added.)

The Committee concluded that the Apprendi exception applies even though the prior conviction must be for a violation of § 940.235 or another of the specified violations listed in § 939.632(1)(e)1, which could be characterized as a fact that goes beyond the mere fact of a conviction. This appears to be the same as the prior convictions, refusals, etc., that are the basis for increased penalties for operating under the influence or with a prohibited alcohol concentration: those must be priors that are counted under § 343.307, but their existence is determined by the court, not the jury.

1. Section 939.23(3). Also see Wis JI-Criminal 923A and B.

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1260 INJURY BY NEGLIGENT HANDLING OF A DANGEROUS WEAPON — § 940.24[1]

Statutory Definition of the Crime

Injury by negligent handling of a dangerous weapon, as defined in § 940.24 of the Criminal Code of Wisconsin, is committed by one who causes bodily harm to another human being by the negligent operation or handling of a dangerous weapon.

State's Burden of Proof

Before you may find the defendant guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following three elements were present.

Elements of the Crime That the State Must Prove

1. The defendant operated or handled a dangerous weapon.
2. The defendant operated or handled[2] a dangerous weapon in a manner constituting criminal negligence.
3. The defendant's operation or handling of a dangerous weapon caused bodily harm to (name of victim).

   "Cause" means that criminal negligence by the defendant was a substantial factor in producing bodily harm.[3]

   "Bodily harm" means physical pain or injury, illness, or any impairment of physical condition.[4]

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Meaning of "Dangerous Weapon"

"Dangerous weapon" means[5]

[any firearm, whether loaded or unloaded. A firearm is a weapon that acts by force of gunpowder.]

[any device designed as a weapon and capable of producing death or great bodily harm. "Great bodily harm" means serious bodily injury.[6]]

[any device or instrumentality which, in the manner it is used or intended to be used, is likely to produce death or great bodily harm. "Great bodily harm" means serious bodily injury.[7]][8]

[any electric weapon. An electric weapon is a device designed or used to immobilize or incapacitate a person by the use of electric current.]

Meaning of "Criminal Negligence"

"Criminal negligence" means:[9]

- the defendant's operation or handling of a dangerous weapon created a risk of death or great bodily harm; and
- the risk of death or great bodily harm was unreasonable and substantial; and
- the defendant should have been aware that (his) (her) operation or handling of a dangerous weapon created the unreasonable and substantial risk of death or great bodily harm.

IF REFERENCE TO ORDINARY NEGLIGENCE IS BELIEVED TO BE HELPFUL OR NECESSARY SEE WIS JI-CRIMINAL 925.[10]

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Jury's Decision

If you are satisfied beyond a reasonable doubt that all three elements of this offense have been proved, you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.

COMMENT

Wis JI-Criminal 1260 was originally published in 1963 and revised in 1986, 1988 and 2000. This revision was approved the Committee in February 2011 and involved adding reference to 2011 Wisconsin Act 2 to the Comment and reorganizing the definitions in the text.

This instruction is for a violation of § 940.24, as amended by 1987 Wisconsin Act 399 as part of the revision of the homicide statutes. The amended statute applies to offenses committed on or after January 1, 1989, and this instruction replaces Wis JI-Criminal 1260 (© 1989) for offenses committed after that date. For a discussion of the homicide revision generally, and of the offense covered by this instruction, see the Introductory Comment at Wis JI-Criminal 1000.

2011 Wisconsin Act 2 amended § 940.24 to add an exception by creating subsection (3) to read:

> (3) Subsection (1) does not apply to a health care provider acting within the scope of his or her practice or employment.

"Health care provider" is defined in one other Criminal Code statute. Section 940.20(7)(a)3. provides: "'Health care provider' means any person who is licensed, registered, permitted or certified by the department of health services or the department of regulation and licensing to provide health care services in this state." Note that § 940.24 applies only to criminal negligence in the "operation or handling of a dangerous weapon, explosives, or fire . . ." It is not obvious to the Committee how the exception for health care providers would relate to the elements of this offense.

The usual practice in Wisconsin is to treat statutory exceptions like affirmative defenses: If there is some evidence of the exception, the burden is on the state to prove that the exception does not apply. See, for example, Wis JI-Criminal 1335, Carrying A Concealed Weapon, which recommends adding an element where there is a claim that the defendant was a peace officer; peace officers are subject to an exception from the ban on carrying concealed weapon in § 941.23.

1. The 1988 homicide revision amended the list of instrumentalities in § 940.24 by striking "firearm, airgun, knife or bow and arrow" and replacing those terms with "dangerous weapons, explosives or fire."

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The Judicial Council Note to § 940.24 (1987 Senate Bill 191) indicates that the intent was not to eliminate any of the previously mentioned instrumentalities:

> The definition of the offense is broadened to include highly negligent handling of fire, explosives and dangerous weapons other than a firearm, airgun, knife or bow and arrow. See s. 939.22(10), stats.

2. In State v. Bodoh, 226 Wis.2d 718, 595 N.W.2d 330 (1999), the Wisconsin Supreme Court concluded that § 940.24 could apply to a case where the defendant's dogs caused injury to a fourteen-year-old boy who was riding a bicycle. The decision resorted to the dictionary to conclude that Bodoh did not "operate" his dogs because a person normally has to be present to "perform a function with a dog or to control the functioning of a dog." However, the court found that a person need not be physically present to "handle" a dog: Bodoh handled the dogs because he "was responsible for supervising, directing, and controlling his dogs." 226 Wis.2d 718, 731.

3. The Committee has concluded that the simple "substantial factor" definition of cause should be sufficient in most cases. Where there is evidence of more than one possible cause, something like the following might be added immediately preceding the sentence in the instruction beginning with "before":

> There may be more than one cause of bodily harm. The act of one person alone might produce it, or the acts of two or more persons might jointly produce it.

Also see Wis JI-Criminal 901.

4. This is the definition of "bodily harm" provided in § 939.22(4).

5. Choose the alternative supported by the evidence. They are based on the definition of "dangerous weapon" provided in s. 939.22(10). See Wis JI-Criminal 910 for footnotes discussing each alternative.

6. The Committee has concluded that defining great bodily harm as "serious bodily injury" is sufficient in most cases. See Wis JI-Criminal 914 for a complete discussion of that term, as defined in § 939.22(14).

7. The Committee has concluded that defining great bodily harm as "serious bodily injury" is sufficient in most cases. See Wis JI-Criminal 914 for a complete discussion of that term, as defined in § 939.22(14).

8. A potential problem in instructing on this part of the definition of dangerous weapon is illustrated by State v. Tomlinson, 2002 WI 91, 254 Wis.2d 502, 648 N.W.2d 367. Tomlinson was charged with being party to the crime of first degree reckless homicide while using a dangerous weapon. In instructing on the dangerous weapon penalty enhancer the court stated: "'Dangerous weapon' means a baseball bat." The supreme court held that the instruction was error, concluding that it created a "mandatory conclusive presumption because it requires the jury to find that Tomlinson used a 'dangerous weapon' . . . if it first finds . . . that he used a baseball bat." 2002 WI 91, ¶62.

In light of Tomlinson, the Committee concluded that the definition of "dangerous weapon" in the instructions should be revised to include all the statutory alternatives in the text of the instruction. The alternative to be used in a case like Tomlinson would be the following:

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"Dangerous weapon" means any device or instrumentality which, in the manner it is used or intended to be used, is likely to produce death or great bodily harm. "Great bodily harm" means serious bodily injury.

If instructing the jury in terms tailored to the facts of the case is believed to be desirable, a different approach for a baseball bat case might be as follows:

The state alleges that a baseball bat was a dangerous weapon. A baseball bat may be considered to be a dangerous weapon if, in the manner it was used, it was calculated or likely to produce death or great bodily harm.

9. The instruction on criminal negligence is based on the definition provided in § 939.25. The Committee concluded that this definition, which highlights the three significant components of the statutory definition, is preferable to the one formerly used, which began by defining "ordinary negligence." See Wis JI-Criminal 925 for a complete discussion of the Committee's rationale for adopting this definition and for optional material that may be added if believed to be necessary.

10. Wis JI-Criminal 925 includes two additional paragraphs: one describing "ordinary negligence" and one explaining how "criminal negligence" differs.

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1261 INJURY (GREAT BODILY HARM) BY NEGLIGENT USE OF A VEHICLE — § 940.245

[INSTRUCTION RENUMBERED — SEE WIS JI-CRIMINAL 2654]

COMMENT

Wis JI-Criminal 1261 was originally published in 1986. It was renumbered Wis JI-Criminal 2654 in 1988.

Section 940.245 was repealed by 1987 Wisconsin Act 399 and recreated as subsection (4) of 346.62, Reckless Driving. The change was made as part of the revision of the homicide and related statutes which had an effective date of January 1, 1989. Wis JI-Criminal 2654 is to be used in place of Wis JI-Criminal 1261 for offenses committed on or after that date.

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1262 INJURY (GREAT BODILY HARM) BY OPERATION OF A VEHICLE WHILE UNDER THE INFLUENCE — § 940.25(1)(a)

Statutory Definition of the Crime

Section 940.25(1)(a) of the Criminal Code of Wisconsin is violated by one who causes great bodily harm to another by the operation of a vehicle while under the influence of an intoxicant.[1]

State's Burden of Proof

Before you may find the defendant guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following three elements were present.

Elements of the Crime That the State Must Prove

1. The defendant operated[2] a vehicle.[3]

   "Operate" means the physical manipulation or activation of any of the controls of a vehicle necessary to put it in motion.[4]

2. The defendant's operation of a vehicle caused great bodily harm to _(name of victim)_.

   "Cause" means that the defendant's operation of a vehicle was a substantial factor[5] in producing great bodily harm.

   "Great bodily harm" means serious bodily injury.[6] [Injury which creates a substantial risk of death, or which causes serious permanent disfigurement, or which

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causes a permanent or protracted loss or impairment of the function of any bodily member or organ, or other serious bodily injury is great bodily harm.]

3. The defendant was under the influence of an intoxicant at the time the defendant operated a vehicle.

Definition of "Under the Influence of an Intoxicant"

"Under the influence of an intoxicant" means that the defendant's ability to operate a vehicle was materially impaired because of consumption of an alcoholic beverage.[7]

Not every person who has consumed alcoholic beverages is "under the influence" as that term is used here. What must be established is that the person has consumed a sufficient amount of alcohol to cause the person to be less able to exercise the clear judgment and steady hand necessary to handle and control a motor vehicle.

It is not required that impaired ability to operate be demonstrated by particular acts of unsafe driving. What is required is that the person's ability to safely control the vehicle be materially impaired.

How to Use the Test Result Evidence

The law states that the alcohol concentration in a defendant's (breath) (blood) (urine) sample taken within three hours of operating a vehicle is evidence of the defendant's alcohol concentration at the time of the operating.[8]

WHERE TEST RESULTS SHOWING MORE THAN 0.04 BUT LESS THAN 0.08 GRAMS HAVE BEEN ADMITTED, THE EVIDENCE IS RELEVANT BUT DOES NOT HAVE PRIMA FACIE EFFECT. SEE WIS JI-CRIMINAL 232.[9]

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WHERE TEST RESULTS SHOWING 0.08 GRAMS OR MORE HAVE BEEN ADMITTED[10] AND THERE IS NO ISSUE RELATING TO THE DEFENDANT'S POSITION ON THE "BLOOD-ALCOHOL CURVE,"[11] THE JURY SHOULD BE INSTRUCTED AS FOLLOWS:

[If you are satisfied beyond a reasonable doubt that there was [.08 grams or more of alcohol in 100 milliliters of the defendant's blood] [.08 grams or more of alcohol in 210 liters of the defendant's breath] at the time the test was taken, you may find from that fact alone that the defendant was under the influence of an intoxicant at the time of the alleged operating, but you are not required to do so. You the jury are here to decide this question on the basis of all the evidence in this case, and you should not find that the defendant was under the influence of an intoxicant at the time of the alleged operating, unless you are satisfied of that fact beyond a reasonable doubt.]

IF AN APPROVED TESTING DEVICE IS INVOLVED, THE FOLLOWING MAY BE ADDED:[12]

[The law recognizes that the testing device used in this case uses a scientifically sound method of measuring the alcohol concentration of an individual. The State is not required to prove the underlying scientific reliability of the method used by the testing device. However, the State is required to establish that the testing device was in proper working order and that it was correctly operated by a qualified person.]

IF THERE IS NO EVIDENCE OF THE DEFENSE DEFINED BY SECTION 940.25(2), USE THE FOLLOWING CLOSING:[13]

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[Jury's Decision]

[If you are satisfied beyond a reasonable doubt that all three elements of this offense have been proved, you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.]

IF THERE IS EVIDENCE OF THE DEFENSE DEFINED BY SECTION 940.25(2),[14] USE THE FOLLOWING:

[Consider Whether the Defense is Proved]

[Wisconsin law provides that it is a defense to this crime if the great bodily harm would have occurred even if the defendant had been exercising due care and had not been under the influence of an intoxicant.

The burden is on the defendant to prove by evidence which satisfies you to a reasonable certainty by the greater weight of the credible evidence[15] that this defense is established.

"By the greater weight of the evidence" is meant evidence which, when weighed against that opposed to it, has more convincing power. "Credible evidence" is evidence which in the light of reason and common sense is worthy of belief.]

ADD THE FOLLOWING IF REQUESTED AND IF EVIDENCE OF THE CONDUCT OF THE VICTIM HAS BEEN INTRODUCED AS RELEVANT TO THE AFFIRMATIVE DEFENSE. DO NOT GIVE WITHOUT CLEAR JUSTIFICATION.[16]

[Evidence has been received relating to the conduct of (name of victim) at the time of the alleged crime. Any failure by (name of victim) to exercise due care[17] does not by itself provide a defense to the crime charged against the defendant.[18] Consider evidence of the conduct of (name of victim) in deciding whether the defendant has established that the great

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bodily harm would have occurred even if the defendant had not been under the influence of an intoxicant and had been exercising due care.]

Jury's Decision

[If you are satisfied to a reasonable certainty by the greater weight of the credible evidence that this defense is proved, you must find the defendant not guilty.

If you are not satisfied to a reasonable certainty by the greater weight of the credible evidence that this defense is proved and you are satisfied beyond a reasonable doubt that all elements of this offense have been proved, you should find the defendant guilty.

If you are not satisfied beyond a reasonable doubt that all elements of this offense have been proved, you must find the defendant not guilty.[19]]

COMMENT

Wis JI-Criminal 1262 was originally published in 1978 and revised in 1982, 1986, 1988, 1993, 2004, and 2006. This revision was approved by the Committee in February 2014.

This instruction is drafted for violations of § 940.25(1)(a), causing great bodily harm while operating under the influence an intoxicant. For cases involving great bodily harm to an unborn child, see Wis JI-Criminal 1185A which identifies the changes that should be made in the instructions.

The 2006 revision reflected the correction made in § 885.235 by 2005 Wisconsin Act 8. That correction restored statutory authority for giving prima facie effect to test results in cases where the defendant has three or more priors. See Wis JI-Criminal 2600 Introductory Comment, sec. VII.

See Wis JI-Criminal 1263 for the related offense involving a prohibited alcohol concentration [PAC] of .08 or more. For persons with three or more priors, the PAC level is .02. See Wis JI-Criminal 1263A. For cases involving two charges — under the influence and PAC — Wis JI-Criminal 1189 can be used as a model.

Section 940.25(2) provides that the defendant "has a defense if he or she proves by a preponderance of the evidence that the great bodily harm would have occurred even if he or she had been exercising due care and he or she had not been under the influence . . ." The defense is addressed in the instruction by using an alternative ending, see text at footnote 14 and following. The defense was formerly addressed in a separate instruction, Wis JI-Criminal 1188, which has been withdrawn. The constitutionality of the defense was

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upheld by the Wisconsin Supreme Court in State v. Caibaiosai, 122 Wis.2d 587, 363 N.W.2d 574 (1985). See Wis JI-Criminal 2600 Introductory Comment, Sec. X.

The 2004 revision adopted a new format for footnotes. Footnotes common to several instructions are collected in the Introductory Comment that precedes Wis JI-Criminal 2600. They are cross-referenced by paragraph number in the footnotes for the individual instructions to which they apply. Footnotes unique to individual instructions are included in full in those instructions.

1. This instruction is drafted for cases involving the influence of an intoxicant, which is defined to include "an alcohol beverage, hazardous inhalant, . . . a controlled substance or controlled substance analog under ch. 961, . . . any combination of an alcohol beverage, hazsardous inhalant, controlled substance and controlled substance analog, or . . . any other drug, or . . . an alcohol beverage and any other drug." See § 939.22(42) in note 7, below. For a model tailored to Motor Vehicle Code offenses involving the influence of a controlled substance, see Wis JI-Criminal 2664. For a model tailored to Motor Vehicle Code offenses involving the combined influence of an intoxicant and a controlled substance, see Wis JI-Criminal 2664A. For a model tailored to Motor Vehicle Code offenses involving a "hazardous inhalant," see Wis JI-Criminal 2667.

2. Section 940.25 refers only to "operation" of a vehicle. It does not include "handling" as the statute defining the otherwise identical homicide offense does. [Compare § 940.09.]

3. Section 939.22(44) defines "vehicle" as follows:

> "Vehicle" means any self-propelled device for moving persons or property or pulling implements from one place to another, whether such device is operated on land, rails, water, or in the air.

4. Regarding the definition of "operate," see Wis JI-Criminal 2600 Introductory Comment, Sec. III.

5. The Committee has concluded that the simple "substantial factor" definition of cause should be sufficient for most cases. If additional definition is necessary, see note 5, Wis JI-Criminal 1185, and Wis JI-Criminal 901, Cause.

6. The Committee concluded that defining "great bodily harm" as "serious bodily injury" is sufficient in most cases. The material in brackets is the remainder of the definition found in § 939.22(14) and should be used as needed. See Wis JI-Criminal 914 for a complete discussion of "great bodily harm."

7. This instruction is drafted for cases involving the influence of an intoxicant. For a model tailored to Motor Vehicle Code offenses involving the influence of a controlled substance, see Wis JI-Criminal 2664. For a model tailored to Motor Vehicle Code offenses involving the combined influence of an intoxicant and a controlled substance, see Wis JI-Criminal 2664A. The definition in the instruction paraphrases the full definition provided in § 939.22(42):

> "Under the influence of an intoxicant" means that the actor's ability to operate a vehicle or handle a firearm or airgun is materially impaired because of his or her consumption of an alcohol beverage, hazardous inhalant, of a controlled substance or controlled substance analog under ch. 961, of any combination of an alcohol beverage, hazardous inhalant, controlled substance and controlled substance analog, or of any other drug or of an alcohol beverage and any other drug.

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Note: "hazardous inhalant" was added to the definition in § 939.22(42) by 2013 Wisconsin Act 83 [effective date: Dec. 14, 2013]. Act 83 also created a definition of "hazardous inhalant" in § 939.22(15). For a model tailored to Motor Vehicle Code offenses involving a "hazardous inhalant," see Wis JI-Criminal 2667.

For a discussion of issues relating to the definition of "under the influence," see Wis JI-Criminal 2600 Introductory Comment, Sec. VIII.

8. This statement is supported by the general rule stated in § 885.235(1g) that the results of properly conducted alcohol tests are admissible. Whether the test result is accorded any additional evidentiary significance depends on the applicability of other provisions in § 885.235. See Wis JI-Criminal 2600 Introductory Comment, Sec. VII.

9. It may be that cases will be charged under § 940.09(1)(a) where a test has shown an alcohol concentration of more than 0.04 grams but less than 0.08 grams. Section 885.235(1)(b) provides that a test result in this range "is relevant evidence on intoxication . . . but is not to be given any prima facie effect." Wis JI-Criminal 232 provides an instruction for this situation.

10. Regarding the evidentiary significance of test results, see Wis JI-Criminal 2600 Introductory Comment, Sec. VII.

11. Regarding the "blood alcohol curve," see Wis JI-Criminal 2600 Introductory Comment, Sec. VII.

12. Regarding the reliability of the testing device, see Wis JI-Criminal 2600 Introductory Comment, Sec. VII.

13. Section 940.09(2) provides that the defendant "has a defense if he or she proves by a preponderance of the evidence that the death would have occurred even if he or she had been exercising due care and he or she had not been under the influence of an intoxicant . . ." When there is not "some evidence" of the defense in the case, this set of closing paragraphs should be used.

14. See note 13, supra. When there is "some evidence" of the defense in the case, the second set of closing paragraphs should be used.

15. Section 940.09(2) expressly places the burden on the defendant to prove the defense "by a preponderance of the evidence." The instruction describes the standard as "to a reasonable certainty, by the greater weight of the credible evidence," because the Committee concluded that "the greater weight" will be more easily understood by the jury than "preponderance."

16. The material that follows was drafted to respond to the recommendations made by the Wisconsin Supreme Court in State v. Lohmeier, 205 Wis.2d 182, 556 N.W.2d 90 (1996). The court recommended that an instruction be drafted to articulate the rule in § 939.14, **Criminal conduct or contributory negligence of victim no defense.** See Wis JI-Criminal 2600 Introductory Comment, Sec. X.

17. The phrase "failure to exercise due care" is intended to refer to what might be characterized as "negligence" on the part of the victim. The Committee concluded that the term "negligence" should not be used because that highlights the conflict with the rule of § 939.14. The usual substitute for "negligence" would be a reference to the failure to exercise "ordinary care." The instruction uses "due care" instead because that is the term used in the statutory affirmative defense applicable to violations of § § 940.09, 940.25 and 346.63. In cases involving the defense, it would be confusing to refer to "ordinary care" when referring

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to the victim's conduct and to "due care" when referring to the defendant's conduct. Because "due care" is used in the statute, the term is adopted for both references in this instruction. The Committee does not believe that there is a substantive difference between the two terms.

18. The instruction attempts to articulate a very fine distinction which, in the abstract, may be difficult to understand. "Defense" is used here to refer to a special rule of law providing a defense to the crime. However, in plain language, negligence on the part of the victim can be a reason why the defendant is not guilty of the charge. It could prevent the defendant's conduct from being the cause of the harm, or it could satisfy the requirements of the affirmative defense under § 940.09(2). The third sentence in the bracketed material is intended to address the recommendations in Lohmeier that a "bridging" instruction be drafted. See note 16, supra, and Wis JI-Criminal 2600 Introductory Comment, Sec. X.

19. This statement is included to assure that both options for a not guilty verdict are clearly presented:

1) not guilty because the elements have not been proved [regardless of the conclusion about the defense]; and

2) not guilty even though the elements have been proved, because the defense has been established.

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1263 INJURY (GREAT BODILY HARM) BY OPERATION OF A VEHICLE WITH A PROHIBITED ALCOHOL CONCENTRATION — 0.08 GRAMS OR MORE — § 940.25(1)(b)

Statutory Definition of the Crime

Section 940.25(1)(b) of the Criminal Code of Wisconsin is violated by one who causes great bodily harm to another by the operation of a vehicle while that person has a prohibited alcohol concentration.[1]

State's Burden of Proof

Before you may find the defendant guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following three elements were present.

Elements of the Crime That the State Must Prove

1. The defendant operated[2] a vehicle.[3]

   "Operate" means the physical manipulation or activation of any of the controls of a vehicle necessary to put it in motion.[4]

2. The defendant's operation of a vehicle caused great bodily harm to _(name of victim)_.

   "Cause" means that the defendant's operation of a vehicle was a substantial factor[5] in producing the great bodily harm.

   "Great bodily harm" means serious bodily injury.[6] [Injury which creates a substantial risk of death, or which causes serious permanent disfigurement, or which

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causes a permanent or protracted loss or impairment of the function of any bodily member or organ, or other serious bodily injury is great bodily harm.]

3. The defendant had a prohibited alcohol concentration at the time the defendant operated a vehicle.

Definition of "Prohibited Alcohol Concentration"

"Prohibited alcohol concentration" means[7]

[.08 grams or more of alcohol in 210 liters of the person's breath].

[.08 grams or more of alcohol in 100 milliliters of the person's blood].

How to Use the Test Result Evidence

The law states that the alcohol concentration in a defendant's (breath) (blood) (urine) sample taken within three hours of operating a vehicle is evidence of the defendant's alcohol concentration at the time of the operating.[8]

WHERE TEST RESULTS SHOWING 0.08 GRAMS OR MORE HAVE BEEN ADMITTED[9] AND THERE IS NO ISSUE RELATING TO THE DEFENDANT'S POSITION ON THE "BLOOD-ALCOHOL CURVE,"[10] THE JURY SHOULD BE INSTRUCTED AS FOLLOWS:

[If you are satisfied beyond a reasonable doubt that there was [.08 grams or more of alcohol in 100 milliliters of the defendant's blood] [.08 grams or more of alcohol in 210 liters of the defendant's breath] at the time the test was taken, you may find from that fact alone that the defendant had a prohibited alcohol concentration at the time of the alleged operating, but you are not required to do so. You the jury are here to decide this question on the basis of all the evidence in this case, and you should not find that the defendant had a prohibited

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alcohol concentration at the time of the alleged operating, unless you are satisfied of that fact beyond a reasonable doubt.]

IF AN APPROVED TESTING DEVICE IS INVOLVED, THE FOLLOWING MAY BE ADDED:[11]

[The law recognizes that the testing device used in this case uses a scientifically sound method of measuring the alcohol concentration of an individual. The State is not required to prove the underlying scientific reliability of the method used by the testing device. However, the State is required to establish that the testing device was in proper working order and that it was correctly operated by a qualified person.]

IF THERE IS NO EVIDENCE OF THE DEFENSE DEFINED BY SECTION 940.25(2), USE THE FOLLOWING CLOSING:[12]

[Jury's Decision]

[If you are satisfied beyond a reasonable doubt that all three elements of this offense have been proved, you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.]

IF THERE IS EVIDENCE OF THE DEFENSE DEFINED BY SECTION 940.25(2),[13] USE THE FOLLOWING:

[Consider Whether the Defense is Proved]

[Wisconsin law provides that it is a defense to this crime if the great bodily harm would have occurred even if the defendant had been exercising due care and had not had a prohibited alcohol concentration.

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The burden is on the defendant to prove by evidence which satisfies you to a reasonable certainty by the greater weight of the credible evidence[14] that this defense is established.

"By the greater weight of the evidence" is meant evidence which, when weighed against that opposed to it, has more convincing power. "Credible evidence" is evidence which in the light of reason and common sense is worthy of belief.]

ADD THE FOLLOWING IF REQUESTED AND IF EVIDENCE OF THE CONDUCT OF THE VICTIM HAS BEEN INTRODUCED AS RELEVANT TO THE AFFIRMATIVE DEFENSE. DO NOT GIVE WITHOUT CLEAR JUSTIFICATION.[15]

[Evidence has been received relating to the conduct of (name of victim) at the time of the alleged crime. Any failure by (name of victim) to exercise due care[16] does not by itself provide a defense to the crime charged against the defendant.[17] Consider evidence of the conduct of (name of victim) in deciding whether the defendant has established that the great bodily harm would have occurred even if the defendant had not had a prohibited alcohol concentration and had been exercising due care.]

Jury's Decision

[If you are satisfied to a reasonable certainty by the greater weight of the credible evidence that this defense is proved, you must find the defendant not guilty.

If you are not satisfied to a reasonable certainty by the greater weight of the credible evidence that this defense is proved and you are satisfied beyond a reasonable doubt that all elements of this offense have been proved, you should find the defendant guilty.

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If you are not satisfied beyond a reasonable doubt that all elements of this offense have been proved, you must find the defendant not guilty.[18]]

COMMENT

Wis JI-Criminal 1263 was originally published in 1982 and revised in 1986, 1988, 1993, and 2004. This revision was approved by the Committee in June 2005.

This instruction is drafted for violations of § 940.25(1)(b) involving a prohibited alcohol concentration [PAC] of .08 or more. The 2004 revision reflected the change in the prohibited alcohol concentration level for persons with 2 or fewer priors from 0.10 to 0.08 made by 2003 Wisconsin Act 30. The change applies to all offenses committed on or after September 30, 2003. For persons with three or more priors, the PAC level is .02. See Wis JI-Criminal 1263A.

The 2006 revision reflected the correction made in § 885.235 by 2005 Wisconsin Act 8. That correction restored statutory authority for giving prima facie effect to test results in cases where the defendant has three or more priors. See Wis JI-Criminal 2600 Introductory Comment, sec. VII.

For cases involving great bodily harm to an unborn child, see Wis JI-Criminal 1185A which identifies the changes that should be made in the instructions.

See Wis JI-Criminal 1262 for the related offense of causing great bodily harm while operating under the influence, as defined in § 940.25(1)(a). For cases involving two charges — operating under the influence and with a PAC — Wis JI-Criminal 1189 can be used as a model.

Section 940.25(2) provides that the defendant "has a defense if he or she proves by a preponderance of the evidence that the great bodily harm would have occurred even if he or she had been exercising due care and he or she . . . did not have a prohibited alcohol concentration . . ." The defense is addressed in the instruction by using an alternative ending, see text at footnote 13 and following. The defense was formerly addressed in a separate instruction, Wis JI-Criminal 1188, which has been withdrawn. The constitutionality of the defense was upheld by the Wisconsin Supreme Court in State v. Caibaiosai, 122 Wis.2d 587, 363 N.W.2d 574 (1985). See Wis JI-Criminal 2600 Introductory Comment, Sec. X.

The 2004 revision adopted a new format for footnotes. Footnotes common to several instructions are collected in the Introductory Comment that precedes Wis JI-Criminal 2600. They are cross-referenced by paragraph number in the footnotes for the individual instructions to which they apply. Footnotes unique to individual instructions are included in full in those instructions.

1. Section 940.25(1)(b) defines this offense as causing death by operation or handling a vehicle "while the person has a prohibited alcohol concentration as defined in s. 340.01(46m)." Section 340.01(46m), as amended by 2003 Wisconsin Act 30 [effective date: September 30, 2003], provides as follows:

(46m) "Prohibited alcohol concentration" means one of the following:
(a) If the person has 2 or fewer prior convictions, suspensions or revocations, as counted

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under s. 343.307(1), an alcohol concentration of 0.08 or more.

[(b) — repealed]

(c) If the person has 3 or more prior convictions, suspensions or revocations, as counted under s. 343.307(1), an alcohol concentration of more than 0.02.

Section 340.01(1v) defines "alcohol concentration" as follows:

(1v) "Alcohol concentration" means any of the following:

(a) The number of grams of alcohol per 100 milliliters of a person's blood.
(b) The number of grams of alcohol per 210 liters of a persons's breath.

The instruction refers to "prohibited alcohol concentration" in the introductory paragraph and in the general statement of the third element. It then provides for using the appropriate measure of alcohol concentration — blood alcohol or alcohol in the breath — in the definition of the third element. For cases involving 0.02 level, see Wis JI-Criminal 1263A.

2. Section 940.25 refers only to "operation" of a vehicle. It does not include "handling" as the statute defining the otherwise identical homicide offense does. [Compare § 940.09.]

3. Section 939.22(44) defines "vehicle" as follows:

"Vehicle" means any self-propelled device for moving persons or property or pulling implements from one place to another, whether such device is operated on land, rails, water, or in the air.

4. Regarding the definition of "operate," see Wis JI-Criminal 2600 Introductory Comment, Sec. III.

5. The Committee has concluded that the simple "substantial factor" definition of cause should be sufficient for most cases. If additional definition is necessary, see note 5, Wis JI-Criminal 1185, and Wis JI-Criminal 901, Cause.

6. The Committee concluded that defining "great bodily harm" as "serious bodily injury" is sufficient in most cases. The material in brackets is the remainder of the definition found in § 939.22(14) and should be used as needed. See Wis JI-Criminal 914 for a complete discussion of "great bodily harm."

7. The definitions are provided in § 340.01(46m) and (1v). See Wis JI-Criminal 2600 Introductory Comment, Sec. V.

8. This statement is supported by the general rule stated in § 885.235(1g) that the results of properly conducted alcohol tests are admissible. Whether the test result is accorded any additional evidentiary significance depends on the applicability of other provisions in § 885.235. See Wis JI-Criminal 2600 Introductory Comment, Sec. VII.

9. Regarding the evidentiary significance of test results, see Wis JI-Criminal 2600 Introductory Comment, Sec. VII.

10. Regarding the "blood alcohol curve," see Wis JI-Criminal 2600 Introductory Comment, Sec. VII.

11. Regarding the reliability of the testing device, see Wis JI-Criminal 2600 Introductory Comment, Sec. VII.

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12. Section 940.09(2) provides that the defendant "has a defense if he or she proves by a preponderance of the evidence that the death would have occurred even if he or she had been exercising due care and he or she . . . did not have a prohibited alcohol concentration . . ." When there is not "some evidence" of the defense in the case, this set of closing paragraphs should be used.

13. See note 12, supra. When there is "some evidence" of the defense in the case, the second set of closing paragraphs should be used.

14. Section 940.25(2) expressly places the burden on the defendant to prove the defense "by a preponderance of the evidence." The instruction describes the standard as "to a reasonable certainty, by the greater weight of the credible evidence," because the Committee concluded that "the greater weight" will be more easily understood by the jury than "preponderance."

15. The material that follows was drafted to respond to the recommendations made by the Wisconsin Supreme Court in State v. Lohmeier, 205 Wis.2d 182, 556 N.W.2d 90 (1996). The court recommended that an instruction be drafted to articulate the rule in § 939.14, **Criminal conduct or contributory negligence of victim no defense.** See JI 2600 Introductory Comment, Sec. X.

16. The phrase "failure to exercise due care" is intended to refer to what might be characterized as "negligence" on the part of the victim. The Committee concluded that the term "negligence" should not be used because that highlights the conflict with the rule of § 939.14. The usual substitute for "negligence" would be a reference to the failure to exercise "ordinary care." The instruction uses "due care" instead because that is the term used in the statutory affirmative defense applicable to violations of § § 940.09, 940.25 and 346.63. In cases involving the defense, it would be confusing to refer to "ordinary care" when referring to the victim's conduct and to "due care" when referring to the defendant's conduct. Because "due care" is used in the statute, the term is adopted for both references in this instruction. The Committee does not believe that there is a substantive difference between the two terms.

17. The instruction attempts to articulate a very fine distinction which, in the abstract, may be difficult to understand. "Defense" is used here to refer to a special rule of law providing a defense to the crime. However, in plain language, negligence on the part of the victim can be a reason why the defendant is not guilty of the charge. It could prevent the defendant's conduct from being the cause of the harm, or it could satisfy the requirements of the affirmative defense under § 940.09(2). The third sentence in the bracketed material is intended to address the recommendations in Lohmeier that a "bridging" instruction be drafted. See note 15, supra, and Wis JI-Criminal 2600 Introductory Comment, Sec. X.

18. This statement is included to assure that both options for a not guilty verdict are clearly presented:

1) not guilty because the elements have not been proved [regardless of the conclusion about the defense]; and

2) not guilty even though the elements have been proved, because the defense has been established.

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1263A INJURY (GREAT BODILY HARM) BY OPERATION OF A VEHICLE WITH A PROHIBITED ALCOHOL CONCENTRATION — 0.02 GRAMS OR MORE — § 940.09(1)(b)

Statutory Definition of the Crime

Section 940.25(1)(b) of the Criminal Code of Wisconsin is violated by one who causes great bodily harm to another by the operation of a vehicle while that person has a prohibited alcohol concentration.[1]

State's Burden of Proof

Before you may find the defendant guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following [three] [four][2] elements were present.

Elements of the Crime That the State Must Prove

1. The defendant operated[3] a vehicle.[4]

   "Operate" means the physical manipulation or activation of any of the controls of a vehicle necessary to put it in motion.[5]

2. The defendant's operation of a vehicle caused great bodily harm to _(name of victim)_.

   "Cause" means that the defendant's operation of a vehicle was a substantial factor[6] in producing great bodily harm.

   "Great bodily harm" means serious bodily injury.[7] [Injury which creates a substantial risk of death, or which causes serious permanent disfigurement, or which

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causes a permanent or protracted loss or impairment of the function of any bodily member or organ, or other serious bodily injury is great bodily harm.]

3. The defendant had a prohibited alcohol concentration at the time the defendant operated a vehicle.

Definition of "Prohibited Alcohol Concentration"

"Prohibited alcohol concentration" means[8]

[.02 grams or more of alcohol in 210 liters of the person's breath].

[.02 grams or more of alcohol in 100 milliliters of the person's blood].

NOTE: THE DEFENDANT'S ADMISSION OF THREE OR MORE PRIOR CONVICTIONS DISPENSES WITH THE NEED FOR PROOF OF THE FOLLOWING ELEMENT. IF THERE IS AN ADMISSION, DO NOT INSTRUCT ON THIS ELEMENT AND PROCEED TO THE PARAGRAPH CAPTIONED "HOW TO USE THE TEST RESULT EVIDENCE."[9]

[4. The defendant had three or more convictions, suspensions, or revocations, as counted under § 343.307(1).][10]

IF THE FOURTH ELEMENT IS INCLUDED AND IF REQUESTED BY THE DEFENDANT, THE FOLLOWING CAUTIONARY INSTRUCTION SHOULD BE GIVEN:[11]

[Evidence has been received that the defendant had prior convictions, suspensions, or revocations. This evidence was received as relevant to the status of the defendant's driving record, which is an issue in this case. It must not be used for any other purpose and, particularly, you should bear in mind that conviction,

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suspension, or revocation at some previous time is not proof that the defendant operated a motor vehicle with a prohibited alcohol concentration on this occasion.]

How to Use the Test Result Evidence

The law states that the alcohol concentration in a defendant's (breath) (blood) (urine) sample taken within three hours of operating a vehicle is evidence of the defendant's alcohol concentration at the time of the operating.[12]

IF AN APPROVED TESTING DEVICE TEST IS INVOLVED, THE FOLLOWING MAY BE ADDED:[13]

[The law recognizes that the testing device used in this case uses a scientifically sound method of measuring the alcohol concentration of an individual. The State is not required to prove the underlying scientific reliability of the method used by the testing device. However, the State is required to establish that the testing device was in proper working order and that it was correctly operated by a qualified person.]

IF THERE IS NO EVIDENCE OF THE DEFENSE DEFINED BY SECTION 940.25(2), USE THE FOLLOWING CLOSING:[14]

[Jury's Decision]

[If you are satisfied beyond a reasonable doubt that all the elements of this offense have been proved, you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.]

IF THERE IS EVIDENCE OF THE DEFENSE DEFINED BY SECTION 940.25(2),[15] USE THE FOLLOWING:

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[Consider Whether the Defense is Proved]

[Wisconsin law provides that it is a defense to this crime if the great bodily harm would have occurred even if the defendant had been exercising due care and had not had a prohibited alcohol concentration.

The burden is on the defendant to prove by evidence which satisfies you to a reasonable certainty by the greater weight of the credible evidence[16] that this defense is established.

"By the greater weight of the evidence" is meant evidence which, when weighed against that opposed to it, has more convincing power. "Credible evidence" is evidence which in the light of reason and common sense is worthy of belief.]

ADD THE FOLLOWING IF REQUESTED AND IF EVIDENCE OF THE CONDUCT OF THE VICTIM HAS BEEN INTRODUCED AS RELEVANT TO THE AFFIRMATIVE DEFENSE. DO NOT GIVE WITHOUT CLEAR JUSTIFICATION.[17]

[Evidence has been received relating to the conduct of (name of victim) at the time of the alleged crime. Any failure by (name of victim) to exercise due care[18] does not by itself provide a defense to the crime charged against the defendant.[19] Consider evidence of the conduct of (name of victim) in deciding whether the defendant has established that the great bodily harm would have occurred even if the defendant had not had a prohibited alcohol concentration and had been exercising due care.]

Jury's Decision

[If you are satisfied to a reasonable certainty by the greater weight of the credible evidence that this defense is proved, you must find the defendant not guilty.

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If you are not satisfied to a reasonable certainty by the greater weight of the credible evidence that this defense is proved and you are satisfied beyond a reasonable doubt that all elements of this offense have been proved, you should find the defendant guilty.

If you are not satisfied beyond a reasonable doubt that all elements of this offense have been proved, you must find the defendant not guilty.[20]]

COMMENT

This instruction was originally published as Wis JI-Criminal 1263.1 in 1992. In 1998, it was revised and renumbered Wis JI-Criminal 1263A. This revision was approved by the Committee in February 2004.

This instruction has been revised for use for violations of § 940.25(1)(b) involving a prohibited alcohol concentration level [PAC] of .02 or more, which applies to persons with three or more priors. See § 340.01(46m)(c), created by 1999 Wisconsin Act 109. [Effective date: January 1, 2001.]

The fact of having three or more priors is included as a bracketed fourth element in this instruction. It is an element because the existence of priors changes the substantive definition of the crime from an alcohol concentration of .08 or more to one of .02 or more. It is in brackets because it is not to be submitted to the jury if the defendant admits having the priors. See footnotes 2 and 9, below. When priors change the offense from a forfeiture to a crime or increase the criminal penalty, they need not be submitted to the jury. See Apprendi v. New Jersey, 530 U.S. 466, 490 (2000) and Wis JI-Criminal 2600, Sec. IV, D.

The instruction previously published as Wis JI-Criminal 1263A dealt with a PAC of .08 or more. 2003 Wisconsin Act 30 changed the generally applicable PAC level to .08 or more for persons with 2 or fewer prior convictions, suspensions or revocations, as counted under § 343.307(1). [Effective date: September 30, 2003.] Wis JI-Criminal 1263 has been revised to apply to those cases.

See Wis JI-Criminal 1262 for the related offense of causing great bodily harm while operating under the influence, as defined in § 940.25(1)(a). For cases involving two charges — operating under the influence and with a PAC — Wis JI-Criminal 1189 can be used as a model.

For cases involving great bodily harm to an unborn child, see Wis JI-Criminal 1185A which identifies the changes that should be made in the instructions.

Section 940.25(2) provides that the defendant "has a defense if he or she proves by a preponderance of the evidence that the great bodily harm would have occurred even if he or she had been exercising due care and he or she . . . did not have a prohibited alcohol concentration . . ." The defense is addressed in the instruction by using an alternative ending, see text at footnote 15 and following. Regarding the defense, see Wis JI-Criminal 2600 Introductory Comment, Sec. X.

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This revision adopts a new format for footnotes. Footnotes common to several instructions are collected in the Introductory Comment that precedes Wis JI-Criminal 2600. They are cross-referenced by paragraph number in the footnotes for the individual instructions to which they apply. Footnotes unique to individual instructions are included in full in those instructions.

1. Regarding the statutory definition of "prohibited alcohol concentration," see note 1, Wis JI-Criminal 1263.

2. The instruction is drafted to allow for use with either three or four elements, depending on whether the fourth element, relating to the defendant having three or more prior convictions, suspensions or revocations, is submitted to the jury. See discussion at note 9, below.

3. Section 940.25 refers only to "operation" of a vehicle. It does not include "handling" as the statute defining the otherwise identical homicide offense does. [Compare § 940.09.]

4. Section 939.22(44) defines "vehicle" as follows:

> "Vehicle" means any self-propelled device for moving persons or property or pulling implements from one place to another, whether such device is operated on land, rails, water, or in the air.

5. Regarding the definition of "operate," see Wis JI-Criminal 2600 Introductory Comment, Sec. III.

6. The Committee has concluded that the simple "substantial factor" definition of cause should be sufficient for most cases. If additional definition is necessary, see note 5, Wis JI-Criminal 1185, and Wis JI-Criminal 901, Cause.

7. The Committee concluded that defining "great bodily harm" as "serious bodily injury" is sufficient in most cases. The material in brackets is the remainder of the definition found in § 939.22(14) and should be used as needed. See Wis JI-Criminal 914 for a complete discussion of "great bodily harm."

8. The definitions are provided in § 340.01(46m) and (1v). See Wis JI-Criminal 2600 Introductory Comment, Sec. V.

9. The fourth element has been placed in brackets because the Committee concluded that the "status element" of this offense must be addressed in the same manner as for .08 offenses under the version of the law addressed in State v. Alexander, 214 Wis.2d 628, 571 N.W.2d 662 (1997). In Alexander, the Wisconsin Supreme Court referred to this element as a "status element" and held that if the defendant admits having two or more prior convictions, suspensions or revocations [the relevant number under prior law], the "admission dispenses with the need for proof of the status element, either to a jury or to a judge." 214 Wis.2d 628, 646. When there is an admission of the status element, "admitting any evidence of the defendant's prior convictions, suspensions or revocations and submitting the status element to the jury . . . [is] an erroneous exercise of discretion." 214 Wis.2d 628, 651. The court's rationale for removing an element in this situation was that the status element involves facts "entirely outside the gravamen of the offense" and "adds nothing to the State's evidentiary depth or descriptive narrative." 214 Wis.2d 628, 649-50.

The court gave explicit direction to the trial courts as to how to handle this situation:

> "When a circuit court is faced with the circumstances presented in this case, the circuit court should simply instruct the jury that they must find beyond a reasonable doubt that: 1) the

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defendant was driving or operating a motor vehicle on a highway; and 2) the defendant had a prohibited alcohol concentration at the time . . . The 'prohibited alcohol concentration' means 0.08 . . ."
214 Wis.2d 628, 651-52.

By placing the "status element" in brackets, the Committee intends to implement the approach approved in Alexander. If the defendant admits the "status element", the instruction should be given with three elements: causing death, by operating a vehicle, and, having an alcohol concentration of more than .02. If the defendant does not admit the "status element", the instruction should be given with a fourth element: having three or more prior convictions, suspensions or revocations as counted under § 343.307(1).

Because the defendant's admission removes an element from the jury's consideration, the record should reflect the defendant's acknowledgment that a jury determination is, in effect, being waived on the "status element."

10. This element is not to be included if the defendant admits the priors. See note 9, supra.

The text of the fourth element is based on the definition of "prohibited alcohol concentration" in § 340.01(46m)(b). The types of convictions, suspensions, and revocations that are counted under § 343.307(1) are convictions for operating while intoxicated or suspensions or revocations for refusal to submit to chemical tests for alcohol. The priors may include offenses in other jurisdictions. The text of § 343.307(1) is provided in Wis JI-Criminal 2600 Introductory Comment.

The Committee concluded that the instruction should use the statutory language "as counted under § 343.307(1)" because evidence of the defendant's driving record will usually be submitted with testimony that the prior offenses are those that are counted under the statute.

11. Making the fact of prior convictions, etc., an issue for the jury creates the possibility that a jury may make improper use of the evidence relating to the defendant's driving record. Therefore, upon request, an instruction should be given on the limited use to be made of the driving record evidence. In State v. Ludeking, 195 Wis.2d 132, 536 N.W.2d 119 (Ct. App. 1995), the court pointed to this cautionary paragraph as a way to offset the inevitable prejudicial impact of presenting this evidence to the jury.

12. This statement is supported by the general rule stated in § 885.235(1g) that the results of properly conducted alcohol tests are admissible. Whether the test result is accorded any additional evidentiary significance depends on the applicability of other provisions in § 885.235. See Wis JI-Criminal 2600 Introductory Comment, Sec. VII.

13. Regarding the reliability of the testing device, see Wis JI-Criminal 2600 Introductory Comment, Sec. VII.

14. Section 940.09(2) provides that the defendant "has a defense if he or she proves by a preponderance of the evidence that the death would have occurred even if he or she had been exercising due care and he or she . . . did not have a prohibited alcohol concentration . . ." When there is not "some evidence" of the defense in the case, this set of closing paragraphs should be used.

15. See note 14, supra. When there is "some evidence" of the defense in the case, the second set of closing paragraphs should be used.

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16. Section 940.09(2) expressly places the burden on the defendant to prove the defense "by a preponderance of the evidence." The instruction describes the standard as "to a reasonable certainty, by the greater weight of the credible evidence," because the Committee concluded that "the greater weight" will be more easily understood by the jury than "preponderance."

17. The material that follows was drafted to respond to the recommendations made by the Wisconsin Supreme Court in State v. Lohmeier, 205 Wis.2d 182, 556 N.W.2d 90 (1996). The court recommended that an instruction be drafted to articulate the rule in § 939.14, **Criminal conduct or contributory negligence of victim no defense.** See Wis JI-Criminal 2600 Introductory Comment, Sec. X.

18. The phrase "failure to exercise due care" is intended to refer to what might be characterized as "negligence" on the part of the victim. The Committee concluded that the term "negligence" should not be used because that highlights the conflict with the rule of § 939.14. The usual substitute for "negligence" would be a reference to the failure to exercise "ordinary care." The instruction uses "due care" instead because that is the term used in the statutory affirmative defense applicable to violations of § § 940.09, 940.25 and 346.63. In cases involving the defense, it would be confusing to refer to "ordinary care" when referring to the victim's conduct and to "due care" when referring to the defendant's conduct. Because "due care" is used in the statute, the term is adopted for both references in this instruction. The Committee does not believe that there is a substantive difference between the two terms.

19. The instruction attempts to articulate a very fine distinction which, in the abstract, may be difficult to understand. "Defense" is used here to refer to a special rule of law providing a defense to the crime. However, in plain language, negligence on the part of the victim can be a reason why the defendant is not guilty of the charge. It could prevent the defendant's conduct from being the cause of the harm, or it could satisfy the requirements of the affirmative defense under § 940.09(2). The third sentence in the bracketed material is intended to address the recommendations in Lohmeier that a "bridging" instruction be drafted. See note 17, supra, and Wis JI-Criminal 2600 Introductory Comment, Sec. X.

20. This statement is included to assure that both options for a not guilty verdict are clearly presented:

1) not guilty because the elements have not been proved [regardless of the conclusion about the defense]; and

2) not guilty even though the elements have been proved, because the defense has been established.

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1264 FAILURE TO SUPPORT — § 940.27

[INSTRUCTION WITHDRAWN]

COMMENT

Wis JI-Criminal 1264 was originally published in 1985. It was withdrawn in 1989.

This instruction is withdrawn because the statute with which it deals was renumbered by 1987 Wisconsin Act 332, effective July 1, 1989. For offenses occurring on or after July 1, 1989, see Wis JI-Criminal 2152 which applies to violations of § 948.22.

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1265 ABANDONMENT OF A YOUNG CHILD — § 940.28

[INSTRUCTION WITHDRAWN]

COMMENT

Wis JI-Criminal 1265 was originally published in 1969 and was revised in 1980. It was withdrawn in 1989.

This instruction was withdrawn because the statute with which it deals was renumbered and revised by 1987 Wisconsin Act 332, effective July 1, 1989. The offense was recreated as § 948.20. See Wis JI-Criminal 2148.

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1266 INJURY (GREAT BODILY HARM) BY OPERATION OF A VEHICLE WITH A DETECTABLE AMOUNT OF A RESTRICTED CONTROLLED SUBSTANCE — § 940.25(1)(am)

Statutory Definition of the Crime

Section 940.25(1)(am) of the Criminal Code of Wisconsin is violated by one who causes great bodily harm to another by the operation of a vehicle while the person has a detectable amount of a restricted controlled substance in his or her blood.

State's Burden of Proof

Before you may find the defendant guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following three elements were present.

Elements of the Crime That the State Must Prove

1. The defendant operated a vehicle.[1]

   "Operate" means the physical manipulation or activation of any of the controls of a vehicle necessary to put it in motion.[2]

2. The defendant's operation of a vehicle caused great bodily harm to (name of victim).

   "Cause" means that the defendant's operation of a vehicle was a substantial factor[3] in producing great bodily harm.

   "Great bodily harm" means injury which creates a substantial risk of death, or which causes serious permanent disfigurement, or which causes a permanent or

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protracted loss or impairment of the function of any bodily member or organ or other serious bodily injury.[4]

3. The defendant had a detectable amount of a restricted controlled substance[5] in his or her blood at the time the defendant operated a vehicle.

(Name restricted controlled substance) is a restricted controlled substance.[6]

How to Use the Test Result Evidence

The law states that a chemical analysis showing a detectable amount of a restricted controlled substance in a defendant's blood sample is evidence of the presence of a detectable amount of a restricted controlled substance in a defendant's blood at the time of the operating.[7]

USE THE FOLLOWING IF APPROPRIATE:

[If you are satisfied beyond a reasonable doubt that there was a detectable amount of (name restricted controlled substance) in the defendant's blood at the time the sample was taken, you may find from that fact alone that the defendant had a detectable amount of (name restricted controlled substance) in (his) (her) blood at the time of the operating but you are not required to do so. You the jury are here to decide this question on the basis of all the evidence in this case, and you should not find that the defendant had a detectable amount of (name restricted controlled substance) in (his) (her) blood at the time of the alleged operating unless you are satisfied of that fact beyond a reasonable doubt.]

IF THERE IS NO EVIDENCE OF THE DEFENSE DEFINED BY SECTION 940.25(2), USE THE FOLLOWING CLOSING:[8]

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[Jury's Decision]

[If you are satisfied beyond a reasonable doubt that all three elements of this offense have been proved, you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.]

IF THERE IS EVIDENCE OF THE DEFENSE DEFINED BY SECTION 940.25(2),[9] USE THE FOLLOWING:

[Consider Whether the Defense is Proved]

[Wisconsin law provides that it is a defense to this crime if the great bodily harm would have occurred even if the defendant had been exercising due care and had not had a detectable amount of (name restricted controlled substance) in his or her blood.

The burden is on the defendant to prove by evidence which satisfies you to a reasonable certainty by the greater weight of the credible evidence[10] that this defense is established.

"By the greater weight of the evidence" is meant evidence which, when weighed against that opposed to it, has more convincing power. "Credible evidence" is evidence which in the light of reason and common sense is worthy of belief.]

ADD THE FOLLOWING IF REQUESTED AND IF EVIDENCE OF THE CONDUCT OF THE VICTIM HAS BEEN INTRODUCED AS RELEVANT TO THE AFFIRMATIVE DEFENSE. DO NOT GIVE WITHOUT CLEAR JUSTIFICATION.[11]

[Evidence has been received relating to the conduct of (name of victim) at the time of the alleged crime. Any failure by (name of victim) to exercise due care[12] does not by itself provide a defense to the crime charged against the defendant.[13] Consider evidence of the

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conduct of (name of victim) in deciding whether the defendant has established that the great bodily harm would have occurred even if the defendant had not had a detectable amount of (name restricted controlled substance) in his or her blood.]

Jury's Decision

[If you are satisfied to a reasonable certainty by the greater weight of the credible evidence that this defense is proved, you must find the defendant not guilty.

If you are not satisfied to a reasonable certainty by the greater weight of the credible evidence that this defense is proved and you are satisfied beyond a reasonable doubt that all elements of this offense have been proved, you should find the defendant guilty.

If you are not satisfied beyond a reasonable doubt that all elements of this offense have been proved, you must find the defendant not guilty.[14]]

COMMENT

Wis JI-Criminal 1266 was approved by the Committee in June 2010.

This instruction is drafted for violations of § 940.25(1)(am), causing great bodily harm while operating a vehicle with a detectable amount of a restricted controlled substance. The statute was created by 2003 Wisconsin Act 97 and applies to offenses committed on or after the Act's effective date: December 19, 2003. For a general discussion of Act 97, see Wis JI-Criminal 2600 Introductory Comment, Sec. IX.

Section 940.25(2) provides that the defendant "has a defense if he or she proves by a preponderance of the evidence that the great bodily harm would have occurred even if he or she had been exercising due care and . . . he or she did not have a detectable amount of a restricted controlled substance in his or her blood . . ." The defense is addressed in the instruction by using an alternative ending, see text at footnote 8 and following. The constitutionality of the defense was upheld by the Wisconsin Supreme Court in State v. Caibaiosai, 122 Wis.2d 587, 363 N.W.2d 574 (1985). See Wis JI-Criminal 2600 Introductory Comment, Sec. X.

Footnotes common to several instructions are collected in the Introductory Comment that precedes Wis JI-Criminal 2600. They are cross-referenced in the footnotes for the individual instructions to which they apply. Footnotes unique to individual instructions are included in full in those instructions.

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1. Section 939.22(44) defines "vehicle" as follows:

"Vehicle" means any self-propelled device for moving persons or property or pulling implements from one place to another, whether such device is operated on land, rails, water, or in the air.

2. Regarding the definition of "operate," see Wis JI-Criminal 2600 Introductory Comment, Sec. III.

3. The Committee concluded that the simple "substantial factor" definition of cause should be sufficient for most cases. Where there is evidence of more than one possible cause, something like the following might be added immediately preceding the sentence in the instruction beginning with "before":

There may be more than one cause of great bodily harm. The act of one person alone might produce it, or the acts of two or more persons might jointly produce it.

The statute does provide the defendant with an affirmative defense in certain situations, see footnote 8, below. The defense is closely related to the cause element but, in the Committee's judgment, deals with a different issue and may apply even if the defendant's operation was the cause as required by the second element. If the defendant's operation caused the great bodily harm, the defense allows the defendant to avoid liability if it is established that the great bodily harm would have occurred even if the defendant had not been operating "with a detectable amount" and had been exercising due care. The constitutionality of eliminating causal negligence as an element and providing the affirmative defense was upheld by the Wisconsin Supreme Court in State v. Caibaiosai, 122 Wis.2d 587, 363 N.W.2d 574 (1985).

See Wis JI-Criminal 2600 Introductory Comment, Sec. X.

4. See § 939.22(14) and Wis JI-Criminal 914.

5. The Committee suggests that the name of the restricted controlled substance be used throughout the instruction. See note 1, supra.

6. The Committee concluded that it adds clarity to tell the jury that the alleged substance does qualify as a restricted controlled substance under the statute. Whether the defendant actually had a detectable amount of the substance in his or her blood remains a jury question.

Section 340.01(50m) defines "restricted controlled substance" as follows:

(50m) 'Restricted controlled substance' means any of the following:

(a) A controlled substance included in schedule I other than tetrahydrocannabinol.
(b) A controlled substance analog, as defined in s. 961.01(4m), of a controlled substance described in par. (a).
(c) Cocaine or any of its metabolites.
(d) Methamphetamine.
(e) Delta-9-tetrahydrocannabinol.

7. This statement is similar to the one used for the results of properly conducted alcohol tests. See, for example, Wis JI-Criminal 2663. [The Committee's general approach to instructing on test results is discussed in Wis JI-Criminal 2600 Introductory Comment, Sec. VII.] The Committee concluded that it is proper to use it for tests in "restricted controlled substance" cases as well.

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Whether additional instruction on the evidentiary significance of the test should be given is not clear, however, because the statute created for "detectable amount of a restricted controlled substance" cases is not phrased in the same way that the alcohol test statutes are. Section 885.235(1k), created by 2003 Wisconsin Act 97, reads as follows:

> 885.235(1k) In any action or proceeding in which it is material to prove that a person had a detectable amount of a restricted controlled substance in his or her blood while operating or driving a motor vehicle . . . if a chemical analysis of a sample of the person's blood shows that the person had a detectable amount of a restricted controlled substance in his or her blood, the court shall treat the analysis as prima facie evidence on the issue of the person having a detectable amount of a restricted controlled substance in his or her blood without requiring any expert testimony as to its effect.

Comparing this statute to § 885.235(1g), the statute addressing alcohol tests, reveals several differences:

- sub. (1k) does not require that the test be taken within 3 hours of driving;
- sub. (1k) does not directly provide for admissibility of test results; and,
- sub. (1k) does not explicitly connect having a detectable amount in the blood at the time of the test with having a detectable amount at the time of driving.

As to the second difference — admissibility — the Committee concluded that the statement "the court shall treat the analysis as prima facie evidence" strongly implies that the analysis is admissible. As to the third difference — connection with the time of driving — the Committee concluded that the statement "the court shall treat the analysis as prima facie evidence on the issue of the person having . . ." may express a legislative intent that the analysis be admissible to prove the material issue "that a person had a detectable amount of a restricted controlled substance in his or her blood while operating or driving a motor vehicle . . ." as stated at the beginning of sub. (1k). For that reason, the instruction includes a paragraph that addresses the "prima facie" effect of the chemical analysis. The paragraph is in brackets to suggest that trial courts make an independent determination about whether its use is appropriate. To be admissible, the analysis must be found to be relevant to the issue which it is offered to prove.

8. Section 940.25(2) provides that the defendant "has a defense if he or she proves by a preponderance of the evidence that the great bodily harm would have occurred even if he or she had been exercising due care and he or she had not been under the influence of an intoxicant . . ." When there is not "some evidence" of the defense in the case, this set of closing paragraphs should be used.

See Wis JI-Criminal 2600 Introductory Comment, Sec. X.

9. See note 8, supra. When there is "some evidence" of the defense in the case, the second set of closing paragraphs should be used.

10. Section 940.09(2) expressly places the burden on the defendant to prove the defense "by a preponderance of the evidence." The instruction describes the standard as "to a reasonable certainty, by the greater weight of the credible evidence," because the Committee concluded that "the greater weight" will be more easily understood by the jury than "preponderance."

11. The material that follows was drafted to respond to the recommendations made by the Wisconsin Supreme Court in State v. Lohmeier, 205 Wis.2d 182, 556 N.W.2d 90 (1996). The court recommended that

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an instruction be drafted to articulate the rule in § 939.14, Criminal conduct or contributory negligence of victim no defense. See Wis JI-Criminal 2600 Introductory Comment, Sec. X.

12. The phrase "failure to exercise due care" is intended to refer to what might be characterized as "negligence" on the part of the victim. The Committee concluded that the term "negligence" should not be used because that highlights the conflict with the rule of § 939.14. The usual substitute for "negligence" would be a reference to the failure to exercise "ordinary care." The instruction uses "due care" instead because that is the term used in the statutory affirmative defense applicable to violations of §§ 940.09, 940.25 and 346.63. In cases involving the defense, it would be confusing to refer to "ordinary care" when referring to the victim's conduct and to "due care" when referring to the defendant's conduct. Because "due care" is used in the statute, the term is adopted for both references in this instruction. The Committee does not believe that there is a substantive difference between the two terms.

13. The instruction attempts to articulate a very fine distinction which, in the abstract, may be difficult to understand. "Defense" is used here to refer to a special rule of law providing a defense to the crime. However, in plain language, negligence on the part of the victim can be a reason why the defendant is not guilty of the charge. It could prevent the defendant's conduct from being the cause of the harm, or it could satisfy the requirements of the affirmative defense under § 940.09(2). The third sentence in the bracketed material is intended to address the recommendations in Lohmeier that a "bridging" instruction be drafted. See note 11, supra, and Wis JI-Criminal 2600 Introductory Comment, Sec. X.

14. This statement is included to assure that both options for a not guilty verdict are clearly presented:

1) not guilty because the elements have not been proved [regardless of the conclusion about the defense]; and

2) not guilty even though the elements have been proved, because the defense has been established.

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1268 ABUSE OF INDIVIDUALS AT RISK — § 940.285

Statutory Definition of the Crime

Abuse of individuals at risk, as defined in § 940.285 of the Criminal Code of Wisconsin, is committed by one[1] who [(intentionally) (recklessly) (negligently)] subjects an individual at risk to abuse under circumstances that (are likely to) cause [death] [great bodily harm] [(bodily harm)].

State's Burden of Proof

Before you may find the defendant guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following four elements were present.

Elements of the Crime That the State Must Prove

1. (Name of victim) was an individual at risk at the time of the alleged offense.

   CHOOSE ONE OF THE FOLLOWING DEFINITIONS

   ["Individual at risk" means a person age 60 or older who has experienced, is currently experiencing, or is at risk of experiencing abuse, neglect, self-neglect, or financial exploitation.][2]

   ["Individual at risk" means an adult who has a physical or mental condition that substantially impairs his or her ability to care for his or her needs and who has experienced, is currently experiencing, or is at risk of experiencing abuse, neglect, self-neglect, or financial exploitation.][3]

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2. The defendant subjected (name of victim) to [physical abuse] [emotional abuse] [sexual abuse] [treatment without consent] [unreasonable confinement or restraint] [deprivation of a basic need].[4]

CHOOSE ONE OF THE FOLLOWING DEFINITIONS

["Physical abuse" means the intentional or reckless infliction of bodily harm.[5] "Bodily harm" means physical pain or injury, illness, or any impairment of physical condition.[6]]

["Emotional abuse" means language or behavior that serves no legitimate purpose and is intended to be intimidating, humiliating, threatening, frightening, or otherwise harassing, and that does or reasonably could intimidate, humiliate, threaten, frighten, or otherwise harass the individual to whom the conduct or language is directed.][7]

["Sexual abuse" means sexual assault as defined in section 940.225 of the Wisconsin Statutes.][8]

["Treatment without consent" means the administration of medication to an individual who has not provided informed consent, or the performance of psychosurgery, electroconvulsive therapy, or experimental research on an individual who has not provided informed consent, with the knowledge that no lawful authority exists for the administration or performance."][9]

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["Unreasonable confinement or restraint" includes the intentional and unreasonable confinement of an individual in a locked room, involuntary separation of an individual from his or her living area, use on an individual of physical restraining devices, or the provision of unnecessary or excessive medication to an individual, but does not include the use of these methods or devices in entities regulated by the department if the methods or devices are employed in conformance with state and federal standards governing confinement and restraint.][10]

["Deprivation of a basic need" means deprivation of a basic need for food, shelter, clothing, or personal or health care, including deprivation resulting from the failure to provide or arrange for a basic need by a person who has assumed responsibility for meeting the need voluntarily or by contract, agreement, or court order.][11]

3. The defendant acted (intentionally) (recklessly) (negligently).

["Intentionally" means that the defendant acted with the mental purpose to subject (name of victim) to abuse or was aware that (his)(her) conduct was practically certain to cause that result. "Intentionally" also requires that the defendant knew that (name of victim) was an individual at risk .][12]

["Recklessly" means conduct that creates a situation of unreasonable risk of harm and demonstrates a conscious disregard for the safety of the individual at risk.][13]

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["Negligently" means that the defendant acted in a manner constituting criminal negligence. (ADD WIS JI-CRIMINAL 925 CRIMINAL NEGLIGENCE).][14]

4. The defendant (intentionally) (recklessly) (negligently) subjected an individual at risk to abuse under circumstances that [(were likely to cause) (caused)] [(death) (great bodily harm) (bodily harm)].[15]

["Cause" means that the defendant's conduct was a substantial factor in producing (death) (great bodily harm) (bodily harm).][16]

["Great bodily harm" means serious bodily injury.][17]

["Bodily harm" means physical pain or injury, illness, or any impairment of physical condition.][18]

[ADD THE FOLLOWING FOR CASES INVOLVING INTENTIONAL ABUSE

[Deciding About Intent and Knowledge]

[You cannot look into a person's mind to find intent or knowledge. Intent and knowledge must be found, if found at all, from the defendant's acts, words, and statements, if any, and from all the facts and circumstances in this case bearing upon intent and knowledge.]

Jury's Decision

If you are satisfied beyond a reasonable doubt that all four elements of this offense have been proved, you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.

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COMMENT

Wis JI-Criminal 1268 was originally published in 1986 and revised in 1998 and 2003. This revision was approved by the Committee in December 2006; it reflects changes made by 2005 Wisconsin Acts 264 and 388.

The 2007 revision reflected changes made to §940.285 by 2005 Wisconsin Acts 264 and 388. The primary changes were to replace "vulnerable adult" with "individual at risk" and "maltreatment" with "abuse," adding new definitions for the latter. Act 388 also created an exception in sub. (1m): "Nothing in this section may be construed to mean that a vulnerable adult [sic] is abused solely because he or she consistently relies upon treatment by spiritual means through prayer for healing, in lieu of medical care, in accordance with his or her religious traditions."

Section 940.285 recognizes a variety of harms and a variety of mental states. The Committee concluded that the best way to address the considerable complexity that has resulted is to provide a single model instruction which can be modified to refer to the appropriate mental state and degree of harm. This has resulted in the use of many brackets and parentheses. To illustrate that the instruction becomes simpler when proper selection of alternatives is made, an example is provided at Wis JI-Criminal 1268 EXAMPLE.

Section 940.285, as amended by 2005 Wisconsin Acts 264 and 388, defines the following offenses.

Offense	Penalty
Intentionally or recklessly subject an individual at risk to abuse and cause death	Class C felony [sub. (2)(b)1g.]
Negligently subject an individual at risk to abuse and cause death	Class D felony [sub. (2)(b)1g.]
Intentionally, recklessly, or negligently subject an individual at risk to abuse and cause great bodily harm	Class F felony [sub. (2)(b)1m.]
Intentionally subject an individual at risk to abuse under circumstances likely to cause great bodily harm	Class G felony [sub.(2)(b)1r.]
Recklessly or negligently subject an individual at risk to abuse under circumstances likely to cause great bodily harm	Class I felony [sub.(2)(b)1r.]
Intentionally subject an individual at risk to abuse under circumstances that cause bodily harm	Class H felony [sub. (2)(b)2.]
Intentionally subject an individual at risk to abuse under circumstances likely to cause bodily harm	Class I felony [sub. (2)(b)2.]

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Recklessly or negligently subject an individual at risk to abuse under circumstances that cause or are likely to cause bodily harm	Class A misdr. [sub. (2)(b)4.]
Intentionally, recklessly, or negligently subject an individual at risk to abuse under circumstances not causing and not likely to cause bodily harm	Class B misdr. [sub. (2)(b)5.]

Because the statute defines so many different offenses, there is the potential for a variety of lesser included offense questions.

One potential question is easily resolved: a special subsection of § 939.66 provides that all less serious violations of § 940.285 are included offenses of more serious violations. See § 939.66(6c).

Two general categories of variables govern the lesser included offense possibilities. First, there may be a different mental state: the statute provides three alternatives: subjecting an individual at risk to abuse intentionally, recklessly, or negligently. Second, the abuse may have occurred under circumstances involving different levels of harm: causing death, great bodily harm, or bodily harm; likely to cause great bodily harm or bodily harm; and not causing and not likely to cause bodily harm.

Presenting lesser included offenses in a way that will be understandable to the jury is a challenge. One approach would be the traditional long form, whereby a complete instruction on the charged offense would be followed by a complete instruction on each applicable lesser included offense. This has the serious disadvantage of resulting in a set of instructions that might be very long and repetitious. However, depending on the lessers and the complexity of their relationship to the charged crime, this may be the most effective way to approach the problem.

The other approach would be take the shorter approach described in Wis JI-Criminal 112A: specifying the difference between the charged crime and the lesser included crime and instructing the jury on that difference.

1. Before being amended by 2005 Wisconsin Act 264, section 940.285 applied to "any person, other than a person in charge of or employed in any facility enumerated in § 940.29 or in a facility or program under s. 940.295(2). . . ." The amended statute lacks any reference to the persons to whom it applies, except for the reference to "any person " in sub. (2)(b).

2. Section 940.285(1)(dg) provides: "'Individual at risk' means an elder adult at risk or an adult at risk" and cross references the definition of "elder adult at risk" in s. 46.90(1)(br). The definition in the instruction is the definition provided in s. 46.90(1)(br) without change.

3. Section 940.285(1)(dg) provides: "'Individual at risk' means an elder adult at risk or an adult at risk" and cross references the definition of "adult at risk" in s. 55.01(1e). The definition in the instruction is the definition provided in s. 55.01(1e) without change.

4. Section 940.285(1)(ag) provides that "abuse" means any of the alternatives listed in subds. 1. - 6. Of that statute and provides cross references to other statutes for definitions of those alternatives. The applicable alternative should be selected and the appropriate definition used.

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5. The definition of "physical abuse" is the one provided in § 46.90(1)(fg), which applies because cross referenced in § 940.285(1)(ag)1.

6. This is the definition provided in § 939.22(4) and in § 46.90(1)(aj). The term may also be used as part of the fourth element.

7. The definition of "emotional abuse" is the one provided in § 46.90(1)(cm), which applies because cross referenced in § 940.285(1)(ag)2.

8. The definition of "sexual abuse" is a paraphrase of the one provided in § 46.90(1)(gd), which applies because cross referenced in § 940.285(1)(ag)3. Section 46.90(1)(gd) states: "'Sexual abuse' means a violation of s. 940.225(1), (2), (3), or (3m)." Definition of the applicable sexual assault offense should be included.

9. The definition of "treatment without consent" is the one provided in § 46.90(1)(h), which applies because cross referenced in § 940.285(1)(ag)4. Select the part of the definition that applies to the case.

10. The definition of "unreasonable confinement or restraint" is the one provided in § 46.90(1)(I), which applies because cross referenced in § 940.285(1)(ag)5. Select the part of the definition that applies to the case.

11. This is definition provided in subd. 6. of s. 940.285(1)(ag).

12. This is based on the general definition of "intentionally" provided in § 939.23(3).

13. This definition of "recklessly" is the one provided in § 940.285(1)(dm). It differs from the general definition of "recklessness" in § 939.24 in several respects. First, it refers to risk of harm; the § 939.24 definition is limited to risks of great bodily harm or death. Second, it refers only to an "unreasonable" risk; § 939.24 requires an unreasonable "and substantial" risk. Third, it refers to "conscious disregard for the safety"; § 939.24 refers to being "aware of the risk." The latter is not believed to be a substantive difference — "conscious disregard" was used in the definition of reckless homicide before the revision in 1989 when it was changed to clarify that a subjective mental state was required.

Note: The definition in § 940.285(1)(dm) continues to refer to "vulnerable adult." That term was replaced by "individual at risk" elsewhere in the statute.

14. Wis JI-Criminal 925 provides a standard definition of "criminal negligence" based on the one provided in § 939.25. That definition applies whenever a criminal statute uses the term "negligent" or "negligently." [See § 939.25(2).] Section 940.285(2)(a)3. contains the phrase: "negligently subjects an individual at risk to abuse."

15. Here insert the appropriate level of harm from the options provided in § 940.285(2)(b). The different levels and the associated penalties are summarized in the Comment preceding footnote 1.

16. If a more extensive definition of "cause" is necessary, see Wis JI-Criminal 901.

17. See § 939.22(14) and Wis JI-Criminal 914.

18. This is the definition provided in § 939.22(4). There is no need to repeat the definition here if it has already been given as part of the second element.

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1268 EXAMPLE ABUSE OF INDIVIDUALS AT RISK: RECKLESSLY SUBJECTING AN INDIVIDUAL AT RISK TO ABUSE UNDER CIRCUMSTANCES THAT CAUSE GREAT BODILY HARM — § 940.285(2)(b)1.m.

Statutory Definition of the Crime

Abuse of individuals at risk, as defined in § 940.285 of the Criminal Code of Wisconsin, is committed by one who recklessly subjects an individual at risk to abuse under circumstances that cause great bodily harm.

State's Burden of Proof

Before you may find the defendant guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following four elements were present.

Elements of the Crime That the State Must Prove

1. (Name of victim) was an individual at risk at the time of the alleged offense.

   "Individual at risk" means a person age 60 or older who has experienced, is currently experiencing, or is at risk of experiencing abuse, neglect, self-neglect, or financial exploitation.

2. The defendant subjected (name of victim) to physical abuse.

   "Physical abuse" means the intentional or reckless infliction of bodily harm. "Bodily harm" means physical pain or injury, illness, or any impairment of physical condition.

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3. The defendant acted recklessly.

"Recklessly" means conduct that creates a situation of unreasonable risk of harm and demonstrates a conscious disregard for the safety of the individual at risk.

4. The defendant recklessly subjected (name of victim) to abuse under circumstances that caused great bodily harm.

"Cause" means that the defendant's conduct was a substantial factor in producing great bodily harm.

"Great bodily harm" means serious bodily injury.

Jury's Decision

If you are satisfied beyond a reasonable doubt that all four elements of this offense have been proved, you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.

COMMENT

Wis JI-Criminal 1268 EXAMPLE was originally published in 199 and revised in 2003. This revision was approved by the Committee in December 2006; it reflects changes made by 2005 Wisconsin Acts 264 and 388.

This instruction attempts to illustrate how the general model provided in Wis JI-Criminal 1268 would be applied to a violation of § 940.285 involving recklessly subjecting an individual at risk to abuse under circumstances causing great bodily harm. Reducing the general model to this example required electing the appropriate material from the many alternatives set forth in brackets and parentheses in Wis JI-Criminal 1268.

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1269 RECKLESS ABUSE OF VULNERABLE ADULTS — § 940.285(2)(b)3

[INSTRUCTION WITHDRAWN]

COMMENT

This instruction was originally published in 1995. It was withdrawn in 1998 when § 940.285 was revised by 1997 Wisconsin Act 180. All violations of § 940.285 are now addressed by Wis JI-Criminal 1268.

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1270 ABUSE OF RESIDENTS OF PENAL FACILITIES — § 940.29

Statutory Definition of the Crime

Abuse of residents of penal facilities, as defined in § 940.29 of the Criminal Code of Wisconsin, is committed by one in charge of or employed in a penal or correctional institution or other place of confinement who abuses, neglects, or ill-treats a person confined in or a resident of that institution or place, or who knowingly permits another person to do so.

State's Burden of Proof

Before you may find the defendant guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following four elements were present.

Elements of the Crime That the State Must Prove

1. The defendant was (in charge of) (employed in) a facility.

2. (Name of victim) was (a resident of) (confined in) a facility.

3. The facility was a [(penal) (correctional) institution] [place of confinement].

   IF A STATUTE IDENTIFIES THE NATURE OF THE FACILITY, ADD THE FOLLOWING.[1]

   [(Name of facility) is a (penal) (correctional) institution.]

4. The defendant (did knowingly) (knowingly permitted[2] another person to) abuse, neglect, or ill-treat (name of victim).

   The phrase "abuse, neglect, or ill-treat"[3] means any act or failure to act which causes unreasonable[4] suffering, misery, or physical harm to a resident.

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[Reasonable conduct necessary for treatment or maintenance of order and discipline in the facility and deprivation incidental to confinement reasonably required by a sentence or commitment are not abuse, neglect, or ill treatment.][5]

Deciding About Knowledge

You cannot look into a person's mind to find out knowledge. Knowledge must be found, if found at all, from the defendant's acts, words, ands statements, if any, and from all the facts and circumstances in this case bearing upon knowledge.

Jury's Decision

If you are satisfied beyond a reasonable doubt that all four elements of this offense have been proved, you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.

COMMENT

Wis JI-Criminal 1270 was originally published in 1974 and revised in 1980, 1991, and 1994. This revision was approved by the Committee in April 2006 and involved adoption of a new format and nonsubstantive changes to the text.

Section 940.29 was amended by 1993 Wisconsin Act 445 (effective date: May 12, 1994) to apply only to "a penal or correctional institution or other place of confinement." The statute had applied to a long list of institutions and facilities. Those places are now covered by § 940.295, created by Act 445. See Wis JI-Criminal 1271, 1271 EXAMPLE, and 1272.

1. The Committee has concluded that the sentence in brackets is permissible as long as there is a statute providing that, for example, a county jail is a penal or correctional institution. See, for example, sec. 801.02(7)(a): ". . . A correctional institution includes a Type 1 prison, . . . , a Type 2 prison, . . ., a county jail and a house of correction." Thus, the element would read: "The Jones County Jail is a correctional institution."

2. A case involving the pre-1984 version of this statute was State v. Serebin, 119 Wis.2d 837, 350 N.W.2d 65 (1984). Serebin was charged under the "knowingly permitted" alternative. There was evidence in that case that staff members of a nursing home had advised the defendant of the various deficiencies in

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staffing and food that were causing harm to the patients. The court found a sufficient causal connection between the failure to remedy the staff shortages and the harm to the patients to sustain the administrator's conviction.

3. The phrase "abuse, neglect, or ill-treat" is, in the Committee's judgment, intended to refer to a single concept involving the causing of unjustified harm to another rather than to state three different ways of committing the offense.

The definition of "abuse, neglect, or ill-treat" is adapted from the one found in the earlier version of Wis JI-Criminal 1270 (© 1974) which was used by the Wisconsin Supreme Court in State v. Serebin, supra, note 2, though not expressly approved. Serebin reviewed the sufficiency of the evidence in a case where the administrator of a nursing home was charged with knowingly permitting the abuse of nursing home residents. The court found that bedsores (which could have been prevented) constituted physical harm and weight loss caused by inadequate diet constituted suffering.

Also see s. 940.295(1)(k), which defines "neglect" for purposes of a related offense.

4. Some discomfort is likely to be unavoidable in any situation where a person is confined in one of the institutions covered by § 940.29. What is prohibited is the causing of harm that is unreasonable under the circumstances.

5. This paragraph is to be used when the evidence provides a basis for it. It is intended to give some explanation of the word "unreasonable" used in the preceding paragraph. It explains that some deprivation may be inherent in confinement in the facilities covered by the statute and that what is prohibited is the causing of suffering or physical harm that goes beyond that level.

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1271 ABUSE OF PATIENTS AND RESIDENTS — § 940.295

Statutory Definition of the Crime

Abuse of patients and residents, as defined in § 940.295 of the Criminal Code of Wisconsin, is committed by one [(in charge of) (employed in)] (name type of facility)[1] who [(intentionally) (recklessly) (negligently)] abuses a [(patient) (resident)] of that [(facility) (program)] (or who knowingly permits another person to do so)[2] under circumstances that (are likely to) cause [death] [great bodily harm] [bodily harm].

State's Burden of Proof

Before you may find the defendant guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following six elements were present.

Elements of the Crime That the State Must Prove

1. The defendant was (in charge of) (employed in) (name of facility).[3]
2. (Name of victim) was a (patient)[4] (resident)[5] of (name of facility).[6]
3. (Name of facility) was a (type of facility).[7]

   [(Type of facility) means (use the applicable statutory definition, if any).]
4. The defendant subjected[8] (name of victim) to [physical abuse] [emotional abuse] [sexual abuse] [treatment without consent] [unreasonable confinement or restraint].[9]

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CHOOSE ONE OF THE FOLLOWING DEFINITIONS

["Physical abuse" means the intentional or reckless infliction of bodily harm.[10] "Bodily harm" means physical pain or injury, illness, or any impairment of physical condition.[11]]

["Emotional abuse" means language or behavior that serves no legitimate purpose and is intended to be intimidating, humiliating, threatening, frightening, or otherwise harassing, and that does or reasonably could intimidate, humiliate, threaten, frighten, or otherwise harass the individual to whom the conduct or language is directed.][12]

["Sexual abuse" means sexual assault as defined in section 940.225 of the Wisconsin Statutes.][13]

["Treatment without consent" means the administration of medication to an individual who has not provided informed consent, or the performance of psychosurgery, electroconvulsive therapy, or experimental research on an individual who has not provided informed consent, with the knowledge that no lawful authority exists for the administration or performance.][14]

["Unreasonable confinement or restraint" includes the intentional and unreasonable confinement of an individual in a locked room, involuntary separation of an individual from his or her living area, use on an individual of physical restraining devices, or the provision of unnecessary or excessive medication to an

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individual, but does not include the use of these methods or devices in entities regulated by the department if the methods or devices are employed in conformance with state and federal standards governing confinement and restraint.][15]

5. The defendant acted (intentionally) (recklessly) (negligently).

["Intentionally" means that the defendant acted with the mental purpose to subject (name of victim) to abuse or was aware that (his)(her) conduct was practically certain to cause that result. "Intentionally" also requires that the defendant knew that (name of victim) was a (patient) (resident) (individual at risk).][16]

["Recklessly" means conduct that creates a situation of unreasonable risk of death or harm to and demonstrates a conscious disregard for the safety of the (patient) (resident).][17]

["Negligently" means that the defendant acted in a manner constituting criminal negligence. (ADD WIS JI-CRIMINAL 925 CRIMINAL NEGLIGENCE).][18]

6. The defendant [intentionally] [recklessly] [negligently] abused (name of victim) under circumstances that [(were likely to cause) (caused)] [death] [great bodily harm] [bodily harm].[19]

["Cause" means that the defendant's conduct was a substantial factor in producing (death) (great bodily harm) (bodily harm)].[20]

["Great bodily harm" means injury which creates a substantial risk of death or which causes serious permanent disfigurement or which causes a permanent or protracted loss or impairment of the function of any bodily member or organ or other serious bodily injury.][21]

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["Bodily harm" means physical pain or injury, illness, or any impairment of physical condition.][22]

ADD THE FOLLOWING FOR CASES INVOLVING INTENTIONAL ABUSE

[Deciding About Intent and Knowledge]

[You cannot look into a person's mind to find intent or knowledge. Intent and knowledge must be found, if found at all, from the defendant's acts, words, and statements, if any, and from all the facts and circumstances in this case bearing upon intent and knowledge.]

Jury's Decision

If you are satisfied beyond a reasonable doubt that all six elements of this offense have been proved, you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.

ADD THE FOLLOWING IF THE DEFENDANT IS CHARGED WITH ABUSE OF A PATIENT OR RESIDENT WHO IS AN "INDIVIDUAL AT RISK":[23]

If you find the defendant guilty, you must answer the following question:

Was (name of victim) an individual at risk?

CHOOSE ONE OF THE FOLLOWING DEFINITIONS

["Individual at risk" means a person age 60 or older who has experienced, is currently experiencing, or is at risk of experiencing abuse, neglect, self-neglect, or financial exploitation.][24]

["Individual at risk" means an adult who has a physical or mental condition that substantially impairs his or her ability to care for his or her needs and who has

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experienced, is currently experiencing, or is at risk of experiencing abuse, neglect, self-neglect, or financial exploitation.][25]

If you are satisfied beyond a reasonable doubt that (name of victim) was an individual at risk, you should answer the question "yes."

If you are not so satisfied, you must answer the question "no."

COMMENT

Wis JI-Criminal 1271 was originally published in 1995 and revised in 1999, 2003, 2007 and 2008. The 2007 revision reflected changes made by 2005 Wisconsin Acts 264 and 388. The 2008 revision updated statutory references in footnotes 23, 24, and 25 to reflect changes made by 2007 Wisconsin Act 45. This revision was approved by the Committee in February 2011 and involved adding reference to 2011 Wisconsin Act 2 to the Comment.

This instruction is drafted for offenses involving intentional, reckless or negligent abuse of patients or residents. The statute also prohibits intentional, reckless or simple neglect. If a case involves a charge of neglect as opposed to abuse, use Wis JI-Criminal 1272.

Section 940.295 recognizes a variety of harms and a variety of mental states. The Committee concluded that the best way to address the considerable complexity that has resulted is to provide a single model instruction which can be modified to refer to the appropriate mental state and degree of harm. This has resulted in the use of many brackets and parentheses. To illustrate that the instruction becomes simpler when proper selection of alternatives is made, an example is provided at Wis JI-Criminal 1271 EXAMPLE.

Section 940.295, as amended by 2005 Wisconsin Acts 264 and 388, defines the following offenses involving abuse of patients or residents.

Offense	Penalty
Intentionally or recklessly abuse a patient or resident and cause death to an individual at risk	Class C felony
Negligently abuse a patient or resident and cause death to an individual at risk	Class D felony [sub. (3)(b)1g.]
Intentionally, recklessly, or negligently abuse a patient or resident and cause great bodily harm to an individual at risk	Class E felony [sub. (3)(b)1m.]

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Intentionally abuse a patient or resident under circumstances that cause great bodily harm [to other than an individual at risk]	Class F felony [sub. (3)(b)1r.]
Intentionally abuse a patient or resident under circumstances that are likely to cause great bodily harm	Class G felony [sub. (3)(b)1r.]
Intentionally abuse a patient or resident under circumstances that cause bodily harm	Class H felony [sub. (3)(b)2.]
Intentionally abuse a patient or resident under circumstances that are likely to cause bodily harm	Class I felony [sub. (3)(b)2.]
Recklessly or negligently abuse a patient or resident under circumstances that cause great bodily harm [to other than an individual at risk]	Class H felony [sub. (3)(b)3.]
Recklessly or negligently abuse a patient or resident under circumstances that are likely to cause bodily harm	Class A misdr. [sub. (3)(b)4.]
Intentionally, recklessly, or negligently abuse a patient or resident under circumstances not causing and not likely to cause bodily harm	Class B misdr. [sub. (3)(b)5.]

Because the statute defines so many different offenses, there is the potential for a variety of lesser included offense questions. One potential question is easily resolved: a special subsection of § 939.66 provides that all less serious violations of § 940.295 are included offenses of more serious violations. See § 939.66(6e).

Two general categories of variables govern the lesser included offense possibilities. First, there may be a different mental state. The statute provides three alternatives: intentionally, recklessly, or simply neglecting a patient or resident. Second, the abuse may have occurred under circumstances involving different levels of harm. Causing death, great bodily harm or bodily harm; likely to cause great bodily harm or bodily harm; and, not causing and not likely to cause bodily harm.

Presenting lesser included offenses in a way that will be understandable to the jury is a challenge. One approach would be the traditional long form, whereby a complete instruction on the charged offense would be followed by a complete instruction on each applicable lesser included offense. This has the serious disadvantage of resulting in a set of instructions that might be very long and repetitious. However, depending on the lessers and the complexity of their relationship to the charged crime, this may be the most effective way to approach the problem. The other approach would be use the shorter form described in Wis JI-Criminal 112A: specifying the difference between the charged crime and the lesser included crime and instructing the jury on that difference.

2011 Wisconsin Act 2 amended § 940.295 to add an exception to the version of the offense defined in sub. (3)(a)3.: abuses, with negligence, or neglects a patient or resident. Subsection (3)(am) is created to read:

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(3)(am) Paragraph (a)3. does not apply to a health care provider acting within the scope of his or her practice or employment who commits an act or omission of mere inefficiency, unsatisfactory conduct, or failure in good performance as the result of inability, incapacity, inadvertency, ordinary negligence, or good faith error in judgment or discretion.

"Health care provider" is defined in one other Criminal Code statute. Section 940.20(7)(a)3. provides: "'Health care provider' means any person who is licensed, registered, permitted or certified by the department of health services or the department of regulation and licensing to provide health care services in this state." The usual practice in Wisconsin is to treat statutory exceptions like affirmative defenses: If there is some evidence of the exception, the burden is on the state to prove that the exception does not apply. See, for example, Wis JI-Criminal 1335, Carrying A Concealed Weapon, which recommends adding an element where there is a claim that the defendant was a peace officer; peace officers are subject to an exception from the ban on carrying concealed weapon in § 941.23.

1. Here specify the type of facility involved, such as "an adult day care center." The facilities covered by the statute are listed in sub. (2) of § 940.295:

(2) Applicability. This section applies to any of the following types of facilities or programs:
(a) An adult day care center.
(b) An adult family home.
(c) A community-based residential facility.
(d) A foster home.
(e) A group home.
(f) A home health agency.
(g) A hospice.
(h) A inpatient health care facility.
(i) A program under § 51.42(2).
(j) The Wisconsin Educational Services Program for the Deaf and Hard of Hearing under § 115.52 and the Wisconsin Center for the Blind and Visually Impaired under § 115.525.
(k) A state treatment facility.
(L) A treatment facility.
(m) A residential care center for children and youth operated by a child welfare agency licensed under § 48.60 or an institution operated by a public agency for the care of neglected, dependent, or delinquent children.
(n) Any other health facility or care-related facility or home, whether publicly or privately owned.

2. Read the phrase in parentheses if the case is based on the defendant permitting another to abuse a patient or resident. In that case, the fourth and sixth elements must be modified. Footnote 8 suggests a modification of the fourth element for "knowingly permits" case. Footnote 19 suggests a modification of the sixth element.

3. Here specify the name of the facility, for example: "The Fairview Care Center."

4. An extensive definition of "patient" is provided in § 940.295(1)(L). If a definition of that term is believed to be necessary, the applicable part of the statutory definition should be added to the instruction.

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5. "Resident" is defined as follows in § 940.295(1)(p): "'Resident' means any person who resides in a facility under sub. (2)."

6. Here specify the name of the facility, for example: "The Fairview Care Center."

7. The name of the facility should be used in the first blank; the type of facility listed in sub. (2) should be used in the second blank. For example: "3. The Fairview Care Center was an adult day care center."

The second sentence allows for providing a definition of the type of facility involved. Cross-references to statutory definitions for many of the types of facilities are provided in sub. (1) of § 940.295:

Facility	Definition
- adult family home	§ 50.01(1)
- community-based residential facility	§ 50.01(1g)
- foster home	§ 48.02(6)
- group home	§ 48.02(7)
- home health agency	§ 50.49(1)(a)
- hospice	§ 50.90(1)
- inpatient health care facility	§ 50.135(1)
- state treatment facility	§ 51.01(15)
- treatment facility	§ 51.01(19)

"Adult day care center" is defined in § 49.45(4), although that definition is not cross-referenced in § 940.295.

8. If the case is based on the defendant knowingly permitting another to abuse a patient or resident, the fourth element should be changed to read as follows:

> 4. The defendant knowingly permitted another person to subject (name of victim) to [physical abuse] [emotional abuse] [sexual abuse] [treatment without consent] [unreasonable confinement or restraint].

9. The statement of this element is a paraphrase of the statute. The statute refers to one who "abuses" a patient or resident, then defines "abuse" by reference to s. 46.90(1)(a). Section 46.90(1)(a) then lists five categories that constitute "abuse." The instruction states the element in the same way that it appears in Wis JI-Criminal 1268 by referring to "subjects to abuse" and then providing definitions for each alternative. No change in meaning is intended.

10. The definition of "physical abuse" is the one provided in § 46.90(1)(fg), which applies because § 940.295(1)(ad) provides: "'Abuse' has the meaning given in s. 46.90(1)(a)." "Physical abuse" is listed in s. 46.90(1(a)1. and defined in s. 46.90(1)(fg).

11. This is the definition provided in § 939.22(4) and in § 46.90(1)(aj). The term may also be used as part of the fourth element.

12. The definition of "emotional abuse" is the one provided in § 46.90(1)(cm), which applies because § 940.295(1)(ad) provides: "'Abuse' has the meaning given in s. 46.90(1)(a)." "Emotional abuse" is listed in s. 46.90(1(a)2. and defined in s. 46.90(1)(cm).

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13. The definition of "sexual abuse" is a paraphrase of the one provided in § 46.90(1)(gd), which applies because cross referenced in § 940.285(1)(ag)3. Section 46.90(1)(gd) states: "'Sexual abuse' means a violation of s. 940.225(1), (2), (3), or (3m)." Definition of the applicable sexual assault offense should be included.

14. The definition of "treatment without consent" is the one provided in § 46.90(1)(h), which applies because § 940.295(1)(ad) provides: "'Abuse' has the meaning given in s. 46.90(1)(a)." "Treatment without consent" is listed in s. 46.90(1(a)4. and defined in s. 46.90(1)(h). Select the part of the definition that applies to the case.

15. The definition of "unreasonable confinement or restraint" is the one provided in § 46.90(1)(i), which applies because § 940.295(1)(ad) provides: "'Abuse' has the meaning given in s. 46.90(1)(a)." "Unreasonable confinement or restraint" is listed in s. 46.90(1(a)5. and defined in s. 46.90(1)(i). Select the part of the definition that applies to the case.

16. This is based on the general definition of "intentionally" provided in § 939.23(3).

17. This definition of "recklessly" is the one provided in § 940.295(1)(o). It differs from the general definition of "recklessness" in § 939.24 in two respects. First, it refers only to an "unreasonable" risk; § 939.24 requires an unreasonable "and substantial" risk. Second, it refers to "conscious disregard for the safety . . ."; § 939.24 refers to being "aware of the risk." The latter is not believed to be a substantive difference — "conscious disregard" was used in the definition of reckless homicide before the revision in 1989 when it was changed to clarify that a subjective mental state was required.

18. The instruction paraphrases s. 940.295(3)(a)3. which refers to the negligence alternative as "abuses, with negligence." "Negligence" is then defined in sub. (1)(km) in manner that is consistent with the regular Criminal Code definition of "criminal negligence." The approach used in the instruction is the same as that used in Wis JI-Criminal 1268. No change in meaning is intended.

19. Here insert the appropriate level of harm from the options provided in § 940.295(3)(b). The different levels and the associated penalties are summarized in the Comment preceding footnote 1.

If the case is based on the defendant knowingly permitting another to abuse a patient or resident, the sixth element should be changed to read as follows:

6. The defendant knowingly permitted another person to [intentionally] [recklessly] [negligently] abuse <u>(name of victim)</u> under circumstances that [caused death] [(caused) (were likely to cause) great bodily harm] [(caused) (were likely to cause) bodily harm].

20. If a more extensive definition of "cause" is necessary, see Wis JI-Criminal 901.

21. See § 939.22(14) and Wis JI-Criminal 914.

22. This is the definition provided in § 939.22(4) and in § 46.90(1)(aj).

23. The penalties set forth in subs. (3)(b)1g. and 1m. apply where death or great bodily harm is caused to an "individual at risk." The Committee concluded that this could be most efficiently handled by presenting

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the issue as a special question for the jury to consider if they find the defendant guilty of the basic offense. The definitions of "individual at risk" are those provided in sub. (1)(ag), (cr), and (hr) of § 940.295.

24. Section 940.295(1)(hr) provides: "'Individual at risk' means an elder adult at risk or an adult at risk." Section 940.295(1)(cr) provides that "'elder adult at risk' has the meaning in s. 46.90(1)(br)." The definition in the instruction is the definition provided in s. 46.90(1)(br) without change.

25. Section 940.295(1)(hr) provides: "'Individual at risk' means an elder adult at risk or an adult at risk." Section 940.295(1)(ag) provides that "'adult at risk' has the meaning given in s. 55.01(1e)." The definition in the instruction is the definition provided in s. 55.01(1e) without change.

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1271 EXAMPLE ABUSE OF PATIENTS AND RESIDENTS: RECKLESS PHYSICAL ABUSE CAUSING GREAT BODILY HARM TO AN INDIVIDUAL AT RISK — § 940.295(3)(b)1m.

Statutory Definition of the Crime

Abuse of patients and residents, as defined in § 940.295 of the Criminal Code of Wisconsin, is committed by one employed in an adult care center who recklessly abuses a resident of that facility under circumstances that cause great bodily harm.

State's Burden of Proof

Before you may find the defendant guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following six elements were present.

Elements of the Crime That the State Must Prove

1. The defendant was employed in The Fairview Care Center.
2. (Name of victim) was a resident The Fairview Care Center.
3. The Fairview Care Center was an adult day care center.[1]
4. The defendant subjected (name of victim) to physical abuse.

   "Physical abuse" means the intentional or reckless infliction of bodily harm. "Bodily harm" means physical pain or injury, illness, or any impairment of physical condition.

5. The defendant acted recklessly.

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"Recklessly" means conduct that creates a situation of unreasonable risk of death or harm to and demonstrates a conscious disregard for the safety of the resident.

6. The defendant recklessly abused (name of victim) under circumstances that caused great bodily harm.

"Cause" means that the defendant's conduct was a substantial factor in producing great bodily harm.

"Great bodily harm" means serious bodily injury.

Jury's Decision

If you are satisfied beyond a reasonable doubt that all six elements of this offense have been proved, you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.

If you find the defendant guilty, you must answer the following question:

Was (name of victim) an individual at risk?

"Individual at risk" means an adult who has a physical or mental condition that substantially impairs his or her ability to care for his or her needs and who has experienced, is currently experiencing, or is at risk of experiencing abuse, neglect, self-neglect, or financial exploitation.

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COMMENT

Wis JI-Criminal 1271 EXAMPLE was originally published in 1999 and revised in 2003. This revision was approved by the Committee in December 2006; it reflected changes made by 2005 Wisconsin Acts 264 and 388.

This instruction attempts to illustrate how the general model provided in Wis JI-Criminal 1271 would be applied to a violation of § 940.295 involving reckless abuse under circumstances causing great bodily harm to an individual at risk. This offense is a Class E felony — see § 940.295(3)(a)2. and (3)(b)1m. Reducing the general model to this example required electing the appropriate material from the many alternatives set forth in brackets and parentheses in the model instruction.

1. There is not a cross-reference in s. 940.295 to a definition of "adult day care center." However, a definition of that term is provided in s. 49.45(4).

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1272 NEGLECT OF PATIENTS AND RESIDENTS — § 940.295

Statutory Definition of the Crime

Neglect of patients and residents, as defined in § 940.295 of the Criminal Code of Wisconsin, is committed by one [(in charge of) (employed in)] (name type of facility)[1] who [intentionally neglects] [recklessly neglects] [neglects][2] a [(patient) (resident)] of that [(facility) (program)] (or who knowingly permits another person to do so)[3] under circumstances that (are likely to) cause [death] [great bodily harm] [bodily harm].

State's Burden of Proof

Before you may find the defendant guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following five elements were present.

Elements of the Crime That the State Must Prove

1. The defendant was (in charge of) (employed in) (name of facility).[4]
2. (Name of victim) was a (patient)[5] (resident)[6] of (name of facility).[7]
3. (Name of facility) was a (type of facility).[8]

   [(Type of facility) means (use the applicable statutory definition, if any).]
4. The defendant [intentionally neglected] [recklessly neglected] [neglected] (name of victim).[9]

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"Neglect" means creating significant risk to the physical or mental health of an individual by the failure of a caregiver to maintain adequate care, services, or supervision for that individual.[10]

IF INTENTIONAL NEGLECT IS ALLEGED, ADD THE FOLLOWING:

["Intentionally" means that the defendant acted with the mental purpose to neglect (name of victim).[11]

IF RECKLESS NEGLECT IS ALLEGED, ADD THE FOLLOWING:

["Recklessly" means that the defendant's conduct created a situation of unreasonable risk of harm to, and demonstrated a conscious disregard for the safety of, the (patient) (resident).][12]

5. The defendant [intentionally neglected] [recklessly neglected] [neglected] (name of victim) under circumstances that [(were likely to cause) (caused)] [death] [great bodily harm] [bodily harm].[13]

["Cause" means that the defendant's conduct was a substantial factor in producing (death) (great bodily harm) (bodily harm)].[14]

["Great bodily harm" means injury which creates a substantial risk of death or which causes serious permanent disfigurement or which causes a permanent or protracted loss or impairment of the function of any bodily member or organ or other serious bodily injury.][15]

["Bodily harm" means physical pain or injury, illness, or any impairment of physical condition.][16]

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Jury's Decision

If you are satisfied beyond a reasonable doubt that all five elements of this offense have been proved, you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.

ADD THE FOLLOWING IF THE DEFENDANT IS CHARGED WITH ABUSE OF A PATIENT OR RESIDENT WHO IS AN "INDIVIDUAL AT RISK":[17]

If you find the defendant guilty, you must answer the following question:

Was (name of victim) an individual at risk?

CHOOSE ONE OF THE FOLLOWING DEFINITIONS

["Individual at risk" means a person age 60 or older who has experienced, is currently experiencing, or is at risk of experiencing abuse, neglect, self-neglect, or financial exploitation.][18]

["Individual at risk" means an adult who has a physical or mental condition that substantially impairs his or her ability to care for his or her needs and who has experienced, is currently experiencing, or is at risk of experiencing abuse, neglect, self-neglect, or financial exploitation.][19]

If you are satisfied beyond a reasonable doubt that (name of victim) was an individual at risk, you should answer the question "yes."

If you are not so satisfied, you must answer the question "no."

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COMMENT

Wis JI-Criminal 1272 was originally published in 1999 and revised in 2003, 2007 and 2008. The 2007 revision reflected changes made by 2005 Wisconsin Acts 264 and 388. The 2008 revision updated statutory references in footnotes 17-19 to reflect changes made by 2007 Wisconsin Act 45. This revision was approved by the Committee in February 2011 and involved adding reference to 2011 Wisconsin Act 2 to the Comment.

This instruction is drafted for offenses involving intentional, reckless or neglect of patients or residents. The statute also prohibits intentional, reckless or negligent abuse. If a case involves a charge of abuse as opposed to neglect, use Wis JI-Criminal 1271.

Section 940.295 recognizes a variety of harms and a variety of mental states. The Committee concluded that the best way to address the considerable complexity that has resulted is to provide a single model instruction which can be modified to refer to the appropriate mental state and degree of harm. This has resulted in the use of many brackets and parentheses. To illustrate that the instruction becomes simpler when proper selection of alternatives is made, an example is provided at Wis JI-Criminal 1271 EXAMPLE.

Section 940.295, as amended by 2005 Wisconsin Acts 264 and 388, defines the following offenses involving neglect of patients or residents.

Offense	Penalty
Intentionally or recklessly neglect a patient or resident and cause death to an individual at risk	Class C felony
Simply* neglect a patient or resident and cause death to an individual at risk	Class D felony [sub. (3)(b)1g.]
Intentionally, recklessly, or simply* neglect a patient or resident and cause great bodily harm to an individual at risk	Class E felony [sub. (3)(b)1m.]
Intentionally neglect a patient or resident under circumstances that cause great bodily harm [to other than an individual at risk]	Class F felony [sub. (3)(b)1r.]
Intentionally neglect a patient or resident under circumstances that are likely to cause great bodily harm	Class G felony [sub. (3)(b)1r.]
Intentionally neglect a patient or resident under circumstances that cause bodily harm	Class H felony [sub. (3)(b)2.]
Intentionally neglect a patient or resident under circumstances that are likely to cause bodily harm	Class I felony [sub. (3)(b)2.]

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Recklessly or simply* neglect a patient or resident under circumstances that cause great bodily harm [to other than an individual at risk]	Class H felony [sub. (3)(b)3.]
Recklessly or simply* neglect a patient or resident under circumstances that are likely to cause bodily harm	Class A misdr. [sub. (3)(b)4.]
Intentionally, recklessly, or simply* neglect a patient or resident under circumstances not causing and not likely to cause bodily harm	Class B misdr. [sub. (3)(b)5.]

*"Simply" is used to refer to offenses under sub. (3)(a)3. alleging only "neglect" in order to distinguish them from offenses requiring "intentional neglect" or "reckless neglect." This approach is based on reading sub. (3)(a)3. with "negligently" modifying only "abuses," not "neglects." Thus, the instruction presents three options: "intentionally neglects"; "recklessly neglects"; or, "neglects."

Because the statute defines so many different offenses, there is the potential for a variety of lesser included offense questions. One potential question is easily resolved: a special subsection of § 939.66 provides that all less serious violations of § 940.295 are included offenses of more serious violations. See § 939.66(6e).

Two general categories of variables govern the lesser included offense possibilities. First, there may be a different mental state. The statute provides three alternatives: intentionally, recklessly, or simply neglecting a patient or resident. Second, the abuse may have occurred under circumstances involving different levels of harm. Causing death, great bodily harm or bodily harm; likely to cause great bodily harm or bodily harm; and, not causing and not likely to cause bodily harm.

Presenting lesser included offenses in a way that will be understandable to the jury is a challenge. One approach would be the traditional long form, whereby a complete instruction on the charged offense would be followed by a complete instruction on each applicable lesser included offense. This has the serious disadvantage of resulting in a set of instructions that might be very long and repetitious. However, depending on the lessers and the complexity of their relationship to the charged crime, this may be the most effective way to approach the problem. The other approach would be use the shorter form described in Wis JI-Criminal 112A: specifying the difference between the charged crime and the lesser included crime and instructing the jury on that difference.

2011 Wisconsin Act 2 amended § 940.295 to add an exception to the version of the offense defined in sub. (3)(a)3.: abuses, with negligence, or neglects a patient or resident. Subsection (3)(am) is created to read:

> (3)(am) Paragraph (a)3. does not apply to a health care provider acting within the scope of his or her practice or employment who commits an act or omission of mere inefficiency, unsatisfactory conduct, or failure in good performance as the result of inability, incapacity, inadvertency, ordinary negligence, or good faith error in judgment or discretion.

"Health care provider" is defined in one other Criminal Code statute. Section 940.20(7)(a)3. provides: "'Health care provider' means any person who is licensed, registered, permitted or certified by the department

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of health services or the department of regulation and licensing to provide health care services in this state." The usual practice in Wisconsin is to treat statutory exceptions like affirmative defenses: If there is some evidence of the exception, the burden is on the state to prove that the exception does not apply. See, for example, Wis JI-Criminal 1335, Carrying A Concealed Weapon, which recommends adding an element where there is a claim that the defendant was a peace officer; peace officers are subject to an exception from the ban on carrying concealed weapon in § 941.23.

1. Here specify the type of facility involved, such as "an adult day care center." The facilities covered by the statute are listed in sub. (2) of § 940.295:

(2) Applicability. This section applies to any of the following types of facilities or programs:
(a) An adult day care center.
(b) An adult family home.
(c) A community-based residential facility.
(d) A foster home.
(e) A group home.
(f) A home health agency.
(g) A hospice.
(h) A inpatient health care facility.
(I) A program under § 51.42(2).
(j) The Wisconsin Educational Services Program for the Deaf and Hard of Hearing under § 115.52 and the Wisconsin Center for the Blind and Visually Impaired under § 115.525.
(k) A state treatment facility.
(L) A treatment facility.
(m) A residential care center for children and youth operated by a child welfare agency licensed under § 48.60 or an institution operated by a public agency for the care of neglected, dependent, or delinquent children.
(n) Any other health facility or care-related facility or home, whether publicly or privately owned.

2. The bracketed material is intended to allow choice of the relevant alternatives which are described as follows in sub. (3)(a):

- intentionally abuses or intentionally neglects [(a)1.]
- recklessly abuses or recklessly neglects [(a)2.]
- negligently abuses or neglects [(a)3.]

This approach is based on reading the last alternative with "negligently" modifying only "abuses," not "neglects." Thus, the instruction presents three options: "intentionally neglects"; "recklessly neglects"; or, "neglects."

3. Read the phrase in parentheses if the case is based on the defendant permitting another to neglect a patient or resident. In that case, the fourth and fifth elements must be modified. Footnote 9 suggests a modification of the fourth element for "knowingly permits" case. Footnote 13 suggests a modification for the fifth element.

4. Here specify the name of the facility, for example: "The Fairview Care Center."

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5. An extensive definition of "patient" is provided in § 940.295(1)(L). If a definition of that term is believed to be necessary, the applicable part of the statutory definition should be added to the instruction.

6. "Resident" is defined as follows in § 940.295(1)(p): "'Resident' means any person who resides in a facility under sub. (2)."

7. Here specify the name of the facility, for example: "The Fairview Care Center."

8. The name of the facility should be used in the first blank; the type of facility listed in sub. (2) should be used in the second blank. For example: "3. The Fairview Care Center was an adult day care center."

The second sentence allows for providing a definition of the type of facility involved. Cross-references to statutory definitions for many of the types of facilities are provided in sub. (1) of § 940.295:

Facility	Definition
- adult family home	§ 50.01(1)
- community-based residential facility	§ 50.01(1g)
- foster home	§ 48.02(6)
- group home	§ 48.02(7)
- home health agency	§ 50.49(1)(a)
- hospice	§ 50.90(1)
- inpatient health care facility	§ 50.135(1)
- state treatment facility	§ 51.01(15)
- treatment facility	§ 51.01(19)

"Adult day care center " is defined in § 49.45(4), although that definition is not cross-referenced in § 940.295.

9. If the case is based on the defendant knowingly permitting another to neglect a patient or resident, the fourth element should be changed to read as follows:

> 4. The defendant knowingly permitted another person to [intentionally neglect] [recklessly neglect] [neglect] (name of victim).

10. This definition is based on the one provided in s. 46.90(1)(f), which applies because it is cross referenced in s. 940.295(1)(k). The definition in the instruction is intended to be more understandable without substantive change. Section 46.90(1)(f) provides:

> (f) "Neglect" means the failure of a caregiver, as evidenced by an act, omission, or course of conduct, to endeavor to secure or maintain adequate care, services, or supervision for an individual, including food, clothing, shelter, or physical or mental health care, and creating significant risk or danger to the individual's physical or mental health. "Neglect" does not include a decision that is made to not seek medical care for an individual, if that decision is consistent with the individual's previously executed declaration or do-not-resuscitate order under ch. 154, a power of attorney for health care under ch. 155, or as otherwise authorized by law.

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11. This applies the common definition of criminal intent — mental purpose to cause the result — to the potentially confusing concept of "intentional neglect." The Committee interpreted this to mean that the defendant must act with the purpose to neglect a patient or resident, with "neglect" given its statutory meaning.

12. This definition of "recklessly" is the one provided in § 940.295(1)(o). It differs from the general definition of "recklessness" in § 939.24 in two respects. First, it refers only to an "unreasonable" risk; § 939.24 requires an unreasonable "and substantial" risk. Second, it refers to "conscious disregard for the safety . . ."; § 939.24 refers to being "aware of the risk." The latter is not believed to be a substantive difference — "conscious disregard" was used in the definition of reckless homicide before the revision in 1989 when it was changed to clarify that a subjective mental state was required.

13. Here insert the appropriate level of harm from the options provided in § 940.295(3)(b). The different levels and the associated penalties are summarized in the Comment preceding footnote 1.

If the case is based on the defendant knowingly permitting another to abuse a patient or resident, the fifth element should be changed to read as follows:

> 5. The defendant knowingly permitted another person to [intentionally] [recklessly] [negligently] abuse (name of victim) under circumstances that [caused death] [(caused) (were likely to cause) great bodily harm] [(caused) (were likely to cause) bodily harm].

14. If a more extensive definition of "cause" is necessary, see Wis JI-Criminal 901.

15. See § 939.22(14) and Wis JI-Criminal 914.

16. This is the definition provided in § 939.22(4) and in § 46.90(1)(aj).

17. The penalties set forth in subs. (3)(b)1g. and 1m. apply where death or great bodily harm is caused to an "individual at risk." The Committee concluded that this could be most efficiently handled by presenting the issue as a special question for the jury to consider if they find the defendant guilty of the basic offense. The definitions of "individual at risk" are those provided in sub. (1)(ag), (cr), and (hr) of § 940.295.

18. Section 940.295(1)(hr) provides: "'Individual at risk' means an elder adult at risk or an adult at risk." Section 940.295(1)(cr) provides that "'elder adult at risk' has the meaning given in s. 46.90(1)(br)." The definition in the instruction is the definition provided in s. 46.90(1)(br) without change.

19. Section 940.295(1)(cr) provides: "'Individual at risk' means an elder adult at risk or an adult at risk." Section 940.295(1)(ag) provides that "'adult at risk' has the meaning given in s. 55.01(1e)." The definition in the instruction is the definition provided in s. 55.01(1e) without change.

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1275 FALSE IMPRISONMENT — § 940.30

Statutory Definition of the Crime

False imprisonment, as defined in § 940.30 of the Criminal Code of Wisconsin, is committed by one who intentionally confines or restrains another without the person's consent and with knowledge that (he) (she) has no lawful authority to do so.

State's Burden of Proof

Before you may find the defendant guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following five elements were present.

Elements of the Crime That the State Must Prove

1. The defendant confined or restrained (name of victim).
2. The defendant confined or restrained (name of victim) intentionally.

   This requires that the defendant had the mental purpose to confine or restrain (name of victim).[1]
3. (Name of victim) was confined or restrained without (his) (her) consent.[2]
4. The defendant had no lawful authority to confine or restrain (name of victim).[3]
5. The defendant knew that (name of victim) did not consent and knew that (he) (she) did not have lawful authority to confine or restrain (name of victim).[4]

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Meaning of "Confined" or "Restrained"

Although this requires genuine restraint or confinement, it does not require that it be in a jail or prison. If the defendant deprived (name of victim) of freedom of movement,[5] or compelled (him) (her) to remain where (he) (she) did not wish to remain, then (name of victim) was confined or restrained. The use of physical force is not required. One may be confined or restrained by acts or words or both.[6]

ADD THE FOLLOWING IF THE ISSUE OF "ESCAPE" IS RAISED BY THE EVIDENCE:[7]

[A person is not confined or restrained if (he) (she) knew (he) (she) could have avoided it by taking reasonable action.]

[A reasonable opportunity to escape does not change confinement or restraint that has occurred.]

ADD THE FOLLOWING IF RAISED BY THE EVIDENCE:[8]

[Meaning of "Without Consent"]

["Without consent" means that there was no consent in fact or that consent was given by (name of victim) because of fear caused by the defendant's use or threat of imminent use of physical violence on ((name of victim)) (on another person in the presence of (name of victim)) (on a member of (name of victim) 's immediate family).]

Deciding About Intent and Knowledge

You cannot look into a person's mind to find out intent or knowledge. Intent and knowledge must be found, if found at all, from the defendant's acts, words, and statements,

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if any, and from all the facts and circumstances in this case bearing upon intent and knowledge.

Jury's Decision

If you are satisfied beyond a reasonable doubt that all five elements of this offense have been proved, you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.

COMMENT

Wis JI-Criminal 1275 was originally published in 1971 and revised in 1990 and 2006. This revision was approved by the Committee in April 2014; it added to footnote 8.

In State v. Baldwin, 62 Wis.2d 521, 215 N.W.2d 541 (1974), the Wisconsin Supreme Court declared that false imprisonment is "a crime of a continuous nature and exists so long as the confinement of the person without his consent continues uninterrupted." 62 Wis.2d 521, 526. The court upheld a conviction for false imprisonment in Milwaukee County after a previous conviction for the same offense in Waukesha County based on the same course of conduct. The court stated that it did not "hold that a continuous imprisonment in an automobile by the same actor constitutes a separate crime in each county through which the auto passes. Here, the actor's participation changed [from aider to principal], the cars changed, and the restraint changed." 62 Wis.2d 521, 525.

In Geitner v. State, 59 Wis.2d 128, 207 N.W.2d 837 (1973), the Wisconsin Supreme Court held that false imprisonment was not a lesser included offense of kidnapping under § 940.31 because it requires proof of a fact which that more serious crime does not: that the defendant knew he had no lawful authority for the confinement or restraint.

1. "Intentionally" is defined in § 939.23(3). The definition changed, effective January 1, 1989, though both the old and new version have "mental purpose" as one definition of "with intent to." It is the other alternative that changed from "reasonably believes his act, if successful, will cause that result" to "is aware that his conduct is practically certain to cause that result." See Wis JI-Criminal 923A and 923B. The Committee concluded that the "mental purpose" part of the definition is most likely to apply in the context of this offense.

2. This offense requires that the confining or restraint was without the consent of the person confined or restrained. Compare § 948.31, which applies to interference with the custody of a child where there may be similar restraint of a child but requires lack of consent by the legal custodian. See Wis JI-Criminal 2166-2168.

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3. Several statutes recognize privileges that may be relevant to a claim of lawful authority to restrain or to confine another. See, for example, § 939.48, self-defense, and § 939.49, defense of property. Subsections 939.49(2) and § 943.50(3) specifically address the restraint of persons suspected of retail theft. Where there is evidence of a privilege, its absence is something the state must prove. The Committee recommends integrating the absence of the privilege into the instruction on the false imprisonment. See Wis JI-Criminal 1220A for an example combining battery and self-defense.

Other statutes, such as those defining the authority of police, may also be relevant. See, for example, §§ 968.24 and 968.25 defining the authority to "stop and question," and § 968.07, dealing with arrest.

Privileges or authority not specifically recognized in statutes may also be relevant. In State v. Teynor, 141 Wis.2d 187, 414 N.W.2d 76 (Ct. App. 1987), the court held that the false imprisonment statute could be applied to a parent charged with restraint of his children. The court found that

> . . . the legislature did not intend that the lawful authority which a parent has to confine or restrain his or her child makes the parent immune from prosecution under the statute for the nonconsensual restraint or confinement of the child. . . . The parental status affords only a privilege which may be asserted as a defense . . . if the conduct is reasonable discipline of a child.

141 Wis.2d 187, 199-200.

The Teynor court concluded that the entry of an order granting temporary custody of the children to his wife deprived Teynor of the lawful authority a parent has to direct the activities of his children, except when exercising lawful visitation.

4. The basis for the knowledge requirement in the fifth element is the provision in § 939.23(3) which states that when the word "intentionally" is used in a criminal statute, it requires "knowledge of those facts which are necessary to make his or her conduct criminal and which are set forth after the word 'intentionally'."

5. The original version of the instruction (© 1971) used "liberty" instead of "freedom of movement." The Committee concluded that the latter term better describes the nature of the offense because it is less abstract. The "essence of false imprisonment" has been referred to as protection of the "interest in freedom from restraint of movement" and "restraint by one person of the physical liberty of another." Herbst v. Wuennenberg, 83 Wis.2d 768, 774, 266 N.W.2d 391 (1978).

6. The reference to "acts or words or both" has been in the instruction since its original publication in 1971, with citation to Am Jur. The current citation is to 32 Am Jur.2d False Imprisonment, § 17 (1982). Also see Hammer and Donohoo, Substantive Criminal Law in Wisconsin, p. 397 (PESI 1988): "mere words could be sufficient if they actually impose a restraint upon the person to whom they are directed." (Citing, R. Perkins and R. Boyce, Criminal Law, 225 (3rd ed. 1982).)

7. One or both of the bracketed paragraphs should be used only when the issue of "escape" is raised by the evidence. They replace a statement in the 1971 version of the instruction to the effect that "if there is some reasonable means of escape, there is no confinement or restraint." The Committee concluded that this statement was potentially confusing if literally applied. The word "escape" implies leaving a situation of confinement or restraint. Yet once there is confinement or restraint, that aspect of the crime of false imprisonment is complete, and a later escape would not affect it. This is the concept expressed in the second

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bracketed paragraph.

In the Committee's judgment, the relevance of escape is more accurately expressed in terms of actions that could reasonably have been taken to avoid confinement or restraint. This is the concept expressed in the first bracketed paragraph.

The "reasonable means of escape" issue was discussed in State v. C.V.C., 153 Wis.2d 145, 450 N.W.2d 463 (Ct. App. 1989). The court relied on a standard from the Restatement of Torts to determine whether a victim had a "reasonable means of escape":

> Since the actor has intended to imprison the other, the other is not required to run any risk of harm to his person or to his chattels or of subjecting himself to any substantial liability to a third person in order to relieve the actor from a liability to which his intentional misconduct has subjected him. So too, even though there may be a perfectly safe avenue of escape, the other is not required to take it if the circumstances are such as to make it offensive to a reasonable sense of decency or personal dignity.

Restatement (Second) of Torts, sec. 36 comment a. (1978).

The standard had previously been applied in a civil case. Herbst v. Wuennenberg, 83 Wis.2d 768, 778-79, 266 N.W.2d 391 (1978). In C.V.C., the court concluded that "the victim was not required to take steps dangerous to herself or offensive to a reasonable sense of decency or personal dignity to free herself in order for the state to prove restraint or confinement. . . ." 153 Wis.2d 145, 150. Also see the Comment to § 340.25 in Volume V 1953 Judiciary Committee Report on the Criminal Code, Wisconsin Legislative Council, page 71 (February 1953).

8. "Without consent" is defined in § 939.22(48). The material in brackets reflects the rule stated in § 939.22(48)(a) and has been included because the use of force, often involved in the crime of false imprisonment, may be relevant to the consent issue as well. When the bracketed material is used, additional explanation is recommended, especially where consent was given because of threats to a third person or family member. Subsections (b) through (d) of § 939.22(48) identify other situations where consent in fact is not to be considered as "consent" under the Criminal Code.

In State v. Long, 2009 WI 36, 317 Wis.2d 92, 765 N.W.2d 557, ¶¶31 and 32, the Wisconsin Supreme Court suggested that the definition of"without consent" in § 940.225(4) should be applied to the false imprisonment statute. Because the decision did not acknowledge that "without consent" is defined in § 939.22(48) — a definition that generally applies to Chapters 939 to 948 "unless the context of a specific section manifestly requires a different construction" § 939.22(48) intro. — the Committee concluded that the definition used in the instruction need not be changed.

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1276 HUMAN TRAFFICKING — § 940.302(2)(a)

Statutory Definition of the Crime

Human trafficking, as defined in § 940.302 of the Criminal Code of Wisconsin, is committed by one who knowingly engages in trafficking for the purpose of [labor or services] [a commercial sex act] and does so by [CHOOSE ONE OF THE FOLLOWING][1]

[causing or threatening to cause bodily harm to any individual.]

[causing or threatening to cause financial harm to any individual.]

[restraining or threatening to restrain any individual.]

[violating or threatening to violate a law.]

[destroying, concealing, removing, confiscating, or possessing, or threatening to destroy, conceal, remove, confiscate, or possess, any actual or purported passport or any other actual or purported official identification document of any individual.]

[extortion.]

[fraud or deception.]

[debt bondage.][2]

[controlling or threatening to control any individual's access to an addictive controlled substance.]

[using any scheme or pattern or other means to directly or indirectly coerce, threaten, or intimidate any individual.]

[using or threatening to use force or violence on any individual.]

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[causing or threatening to cause any individual to do any act against the individual's will or without the individual's consent.]

State's Burden of Proof

Before you may find the defendant guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following three elements were present.

Elements of the Crime That the State Must Prove

1. The defendant knowingly engaged in trafficking.

   "Trafficking" means that the defendant [(recruited) (enticed) (harbored) (transported) (provided) (obtained)] [attempted to (recruit) (entice) (harbor) (transport) (provide) (obtain)] (name of victim) .[3]

2. The defendant (use the term selected in element 1.) (name of victim) for the purpose of [labor or services] [a commercial sex act].[4]

   ["Services" means activities performed by one individual at the request, under the supervision, or for the benefit of another person.][5]

   ["Commercial sex act" means (sexual contact) (sexual intercourse) (sexually explicit performance) (any conduct done for the purpose of sexual humiliation, degradation, arousal, or gratification) for which anything of value is given to, promised, or received, directly or indirectly, by any person.][6]

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3. The defendant engaged in trafficking by (use the term or terms selected in the introductory paragraph).[7]

Deciding About Knowledge and Purpose

You cannot look into a person's mind to find out knowledge and purpose. Knowledge and purpose must be found, if found at all, from the defendant's acts, words, and statements, if any, and from all the facts and circumstances in this case bearing upon knowledge and purpose.

Jury's Decision

If you are satisfied beyond a reasonable doubt that all three elements of this offense have been proved, you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.

COMMENT

Wis JI-Criminal 1276 was originally published in 2011. This revision was approved by the Committee in October 2014; it reflects changes made by 2013 Wisconsin Act 362.

This instruction is drafted for violations of § 940.302, Human trafficking, which was created by 2007 Wisconsin Act 116 [effective date: April 3, 2008]. The statute was amended by 2013 Wisconsin Act 362 [effective date April 25, 2014]. For an example showing how the instruction would read when typical alternatives are selected, see Wis JI-Criminal 1276 EXAMPLE.

Subsection (2)(b) of § 940.302 provides: "Whoever benefits in any manner from a violation of par. (a) is guilty of a Class D felony if the person knows or reasonably should have known that the benefits come from or are derived from an act or scheme described in par. (a)." This instruction does not address this means of violating the statute.

Subsection (2)(c) of sec. § 940.302 was created by 2013 Wisconsin Act 362, by renumbering and revising what formerly was sub. (2) of § 944.33. An instruction is being drafted for violations of sub. (2)(c).

2007 Wisconsin Act 116 also created § 939.46(1m) which provides an affirmative defense for any offense committed by a trafficking victim as a direct result of the violation of the trafficking statute.

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2007 Wisconsin Act 116 also created § 948.051, Trafficking of a child – see Wis JI-Criminal 2124.

1. The applicable term should be selected. The alternatives are those provided in sub. (2)(a)2.a. - L. of § 940.302.

2. Section 940.302(1)(b) defines "debt bondage" as follows: "the condition of a debtor arising from the debtor's pledge of services as a security for debt if the reasonable value of those services is not applied toward repaying the debt or if the length and nature of the services are not defined."

3. The Committee recommends selecting the applicable alternative from the choices in the brackets and parentheses. The choices are those provided in the definition of "trafficking" provided in § 940.302(1)(d).

4. For example, if element 1. involved selecting the "entice" alternative, the second element should read as follows: "The defendant enticed (name of victim) for the purpose of labor or services."

5. This is the definition of "services" provided in § 940.302(1)(c).

6. This is the definition provided in § 940.302(1)(a), as amended by 2013 Wisconsin Act 362. For a definition of "sexual contact" see Wis JI-Criminal 934 and § 939.22(34). The definition in § 939.22(34) applies to this offense; the other "sexual contact" definitions in § 940.225(5)(c) and § 948.01(5) apply to violations of § 940.225 and Chapter 948, respectively.

7. The applicable term should be selected. The alternatives are those provided in sub. (2)(a)2.a. - L. of § 940.302.

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1276 EXAMPLE HUMAN TRAFFICKING — § 940.302(2)(a)

Statutory Definition of the Crime

Human trafficking, as defined in § 940.302 of the Criminal Code of Wisconsin, is committed by one who knowingly engages in trafficking for the purpose of a commercial sex act and does so by causing or threatening to cause bodily harm to any individual.

State's Burden of Proof

Before you may find the defendant guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following three elements were present.

Elements of the Crime That the State Must Prove

1. The defendant knowingly engaged in trafficking.

   "Trafficking" means that the defendant recruited (name of victim).

2. The defendant recruited (name of victim) for the purpose of a commercial sex act.

   "Commercial sex act" means sexual contact for which anything of value is given to, promised, or received, directly or indirectly, by any person.

3. The defendant engaged in trafficking by causing or threatening to cause bodily harm to any individual.

Deciding About Knowledge and Purpose

You cannot look into a person's mind to find out knowledge and purpose. Knowledge and purpose must be found, if found at all, from the defendant's acts, words, and statements,

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if any, and from all the facts and circumstances in this case bearing upon knowledge and purpose.

Jury's Decision

If you are satisfied beyond a reasonable doubt that all three elements of this offense have been proved, you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.

COMMENT

Wis JI-Criminal 1276 EXAMPLE was originally published in 2011. This revision was approved by the Committee in October 2014.

This instruction provides an example showing how Wis JI-Criminal 1276, which applies to violations of § 940.302, Human trafficking, would read when typical alternatives are selected:

- trafficking by recruiting a person;
- for the purpose of a commercial sex act;
- trafficking by causing or threatening to cause bodily harm.

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1277 HUMAN TRAFFICKING — § 940.302(2)(c)

Statutory Definition of the Crime

Human trafficking, as defined in § 940.302(2)(c) of the Criminal Code of Wisconsin, is committed by one who knowingly receives compensation from the earnings of debt bondage, a prostitute, or a commercial sex act.

State's Burden of Proof

Before you may find the defendant guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following two elements were present.

Elements of the Crime That the State Must Prove

1. The defendant received compensation from the earnings of [debt bondage] [a prostitute] [a commercial sex act].

   ["Debt bondage" means the condition of a debtor arising from the debtor's pledge of services as a security for debt if the reasonable value of those services is not applied toward repaying the debt or if the length and nature of the services are not defined.][1]

   ["Prostitute" means a person who intentionally engages in sexual intercourse or other sexual acts for anything of value.][2]

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["Commercial sex act" means (sexual contact) (sexual intercourse) for which anything of value is given to, promised, or received, directly or indirectly, by any person.][3]

2. The defendant received that compensation knowingly. This requires that the defendant knew that the compensation was from the earnings of [debt bondage] [a prostitute] [a commercial sex act].

Deciding About Knowledge

You cannot look into a person's mind to find out knowledge. Knowledge must be found, if found at all, from the defendant's acts, words, and statements, if any, and from all the facts and circumstances in this case bearing upon knowledge.

Jury's Decision

If you are satisfied beyond a reasonable doubt that both elements of this offense have been proved, you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.

COMMENT

Wis JI-Criminal 1277 was approved by the Committee in June 2015.

This instruction is drafted for violations of sub. (2)(c) of § 940.302, Human trafficking, which are Class F felonies. The substance of subsection (2)(c) formerly appeared at § 944.30(2); it was amended and moved to § 940.302 by 2013 Wisconsin Act 362 [effective date: April 25, 2014].

For violations of sub. (2)(a) of § 940.302 see Wis JI-Criminal 1276 and Wis JI-Criminal 1276 EXAMPLE.

Subsection (2)(b) of § 940.302 provides: "Whoever benefits in any manner from a violation of par. (a) is guilty of a Class D felony if the person knows or reasonably should have known that the benefits come

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from or are derived from an act or scheme described in par. (a)." An instruction has not been drafted to address this means of violating the statute.

Section 939.46(1m) provides an affirmative defense for any offense committed by a trafficking victim as a direct result of the violation of the trafficking statute.

For violations of § 948.051, Trafficking of a child, see Wis JI-Criminal 2124.

1. This is the definition provided in § 940.302(1)(b).

2. This is based on part of the definition of "practice prostitution" in Wis JI-Criminal 1562.

3. This is based on the definition provided in § 940.302(1)(a), as amended by 2013 Wisconsin Act 362. The portions of that definition relating to "sexually explicit performance" and "any conduct done for the purpose of sexual humiliation, degradation, arousal, or gratification" are excluded — see § 940.302(1)(a)3. For a definition of "sexual contact" see Wis JI-Criminal 934 and § 939.22(34). The definition in § 939.22(34) applies to this offense; the other "sexual contact" definitions in § 940.225(5)(c) and § 948.01(5) apply to violations of § 940.225 and Chapter 948, respectively.

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1278 TAKING A HOSTAGE — § 940.305

Statutory Definition of the Crime

Taking a hostage, as defined in § 940.305 of the Criminal Code of Wisconsin, is committed by one who, by force or threat of imminent force, seizes, confines, or restrains a person without the person's consent and with intent to use the person as a hostage in order to influence another person to perform or not to perform some action demanded by the defendant [and does not release the person held as a hostage without bodily harm prior to the time of arrest].[1]

State's Burden of Proof

Before you may find the defendant guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following (five) (six)[2] elements were present.

Elements of the Crime That the State Must Prove

1. The defendant (seized) (confined) (restrained)[3] (name of victim) .
2. The defendant (seized) (confined) (restrained) (name of victim) without (his) (her) consent.
3. The defendant (seized) (confined) (restrained) (name of victim) forcibly.
4. The defendant (seized) (confined) (restrained) (name of victim) with intent to use[4] (name of victim) as a hostage in order to influence a person to perform (or not to perform) some action demanded by the defendant.

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5. The defendant demanded by conduct or statements that another person (not) perform some action.[5]

[6. The defendant did not release (name of victim) without bodily harm prior to the defendant's arrest. Bodily harm means physical pain or injury, illness, or any impairment of physical condition.[6]][7]

ADD THE FOLLOWING IF RAISED BY THE EVIDENCE.[8]

[Meaning of "Without Consent"]

["Without consent," as used here, means that there was no consent in fact or that consent was given by (name of victim) because of fear caused by the defendant's use or threat of imminent use of physical violence on ((name of victim)) (on another person in the presence of (name of victim)) (on a member of (name of victim) 's immediate family).]

Meaning of "Forcibly"

"Forcibly" means that the defendant actually used force or threatened the use of imminent force to overcome or to prevent (name of victim) 's resistance to being (seized) (confined) (restrained).[9] "Imminent" means "near at hand" or "on the point of happening."[10]

ADD THE FOLLOWING IF RAISED BY THE EVIDENCE.[11]

["Forcibly" includes the (use of) (threat to use) force directed at a (third person in the presence of) (member of the immediate family of) (name of victim) if that (use of) (threat to use) force results in the (seizing) (confining) (restraining) of (name of victim) .]

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Deciding About Intent

You cannot look into a person's mind to find out intent. Intent must be found, if found at all, from the defendant's acts, words, ands statements, if any, and from all the facts and circumstances in this case bearing upon intent.

Jury's Decision

If you are satisfied beyond a reasonable doubt that all [five] [six] elements of this offense have been proved, you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.[12]

COMMENT

Wis JI-Criminal 1278 was originally published in 1981 and revised in 1990 and 2006. This revision was approved by the Committee in June 2015; it involved a nonsubstantive change to the text.

Section 940.305 was created by Chapter 118, Laws of 1979, and was intended to fill a gap in the kidnapping statute, § 940.31, which fails to cover the situation where a person is kidnapped and held not for money ransom but for the purpose of making someone else do something.

The offense defined by § 940.305 is punishable as a Class B felony if the defendant does not release the hostage without bodily harm prior to his arrest. If this aggravating factor is not present, the crime is a Class C felony. The instruction is drafted for use with either crime; the material in brackets constituting the sixth element is to be included if the Class B felony is charged.

The constitutionality of §940.305 was upheld in the face of a variety of challenges in State v. Bertrand, 162 Wis.2d 411, 469 N.W.2d 873 (Ct. App. 1991).

1. Read this bracketed material if the defendant is charged with a Class B felony, which involves the additional element of failing to release the hostage without injury prior to the defendant's arrest. If this aggravating factor is not present, the offense is punished as a Class C felony. If the Class B felony is charged, it may often be appropriate to submit the Class C felony as a lesser included offense. In that event, the Committee suggests that the procedure described in footnote 12, below, be followed.

2. Read "five elements" if the Class C felony is charged; read "six elements" if the Class B felony is charged. See note 1, supra.

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3. The Committee recommends that one of the alternatives be elected but does not conclude that an instruction joining the three alternatives in the disjunctive would be error. See Clark v. State, 92 Wis.2d 617, 642, 286 N.W.2d 344 (1979), and discussion at note 9, below.

4. Under § 939.23(4), "with intent that" is defined to mean "that the actor either has a purpose to do the thing or cause the result specified, or is aware that his or her conduct is practically certain to cause that result." See Wis JI-Criminal 923A and 923B for further discussion.

5. Whether this element is required is open to question because the statute is ambiguous. Section 940.305, in relevant part, reads as follows:

> Whoever by force or threat of imminent force seizes, confines or restrains a person without the person's consent and with intent to use the person as a hostage in order to influence a person to perform or not to perform some action demanded by the actor is guilty. . . .
> (Emphasis added.)

Is the underlined phrase intended to mean "some action to be demanded" or does it mean "some action that has been demanded?" It can be argued that the underlined phrase is superfluous since the statute would make sense without it: the defendant must have the intent to influence another to perform or not to perform some action. On the other hand, it is a standard rule of statutory construction that a law should be so construed that no word or phrase is rendered surplusage or superfluous. Donaldson v. State, 93 Wis.2d 306, 286 N.W.2d 817 (1980); State v. Wacksmuth, 73 Wis.2d 318, 243 N.W.2d 410 (1976). Further, "taking hostages" is a serious crime, constituting a Class B felony if the hostage is not released without injury.

Given the ambiguity of the statute and the seriousness of the offense, the Committee determined that the ambiguity must be resolved in favor of the defendant. Thus, the fifth element of the instruction requires that an actual demand must have been made by the defendant. Like all other facts, however, the making of a demand may be established circumstantially by consideration of all the conduct and statements of the defendant.

6. This is the definition of "bodily harm" provided in § 939.22(4).

7. Read the sixth element only if the Class B felony is charged. See notes 1 and 2, supra.

8. "Without consent" is defined in § 939.22(48). The material in brackets reflects the rule stated in § 939.22(48)(a) and has been included because the use of force, required as an element of the crime of taking a hostage, will often be relevant to the consent issue as well. When the bracketed material is used, additional explanation is recommended, especially where consent was given because of threats to a third person or family member.

9. This paragraph restates the statutory requirements that the defendant act "by force or threat of imminent force" by phrasing them as alternative ways of satisfying the core requirement that the defendant act "forcibly." The Committee has concluded that this properly emphasizes the intent of the statute to require a link between the seizing or confining of the victim and the defendant's use of force. The Committee has concluded that it is not necessary to elect between the "use of force" and "threat of imminent force" alternatives, although in the usual case election would clarify the issue for the jury and should be done where possible. In support of the proposition that election is not necessary, see Manson v. State, 92 Wis.2d 40, 284 N.W.2d 703 (Ct. App. 1979), and Holland v. State, 91 Wis.2d 134, 280 N.W.2d 288 (1979).

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10. The definition of "imminent" is adapted from the one provided in Black's Law Dictionary, p. 884 (4th ed., 1981).

11. The seizing, confining, or restraining of the victim must be accomplished by force or threat of imminent force. The Committee has concluded that this element may be satisfied when the use or threat of force is directed at a third person or family member as well as if it is directed at the victim. This is based on analogy with the definition of "without consent" in § 939.22(48), see note 8, supra.

12. If the Class B felony is submitted to the jury and an instruction on the Class C felony is appropriate as a lesser included offense, the Committee suggests using the alternative approach for submitting a lesser included offense illustrated in Wis JI-Criminal 112A. That approach highlights the difference between the greater and the lesser offense by focusing on the single element that is different. Here that element is the sixth, requiring that the defendant did not release the victim without bodily harm prior to arrest.

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1280 KIDNAPPING — § 940.31(1)(a)

Statutory Definition of the Crime

Kidnapping, as defined in § 940.31(1)(a) of the Criminal Code of Wisconsin, is committed by one who, by force or threat of imminent force, carries another person from one place to another without consent and with intent to cause (him) (her) to be secretly confined or imprisoned or to be carried out of this state or to be held to service against (his) (her) will.

State's Burden of Proof

Before you may find the defendant guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following four elements were present.

Elements of the Crime That the State Must Prove

1. The defendant transported[1] (name of victim) from one place to another.[2]
2. The defendant transported (name of victim) without (his) (her) consent.
3. The defendant transported (name of victim) from one place to another forcibly.
4. The defendant transported (name of victim) from one place to another with intent that[3] (name of victim) be (secretly confined) (secretly imprisoned) (transported out of this state) (held to service against (his) (her) will).[4]

Deciding About Intent

You cannot look into a person's mind to find out intent. Intent must be found, if found at all, from the defendant's acts, words, ands statements, if any, and from all the facts and circumstances in this case bearing upon intent.

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ADD THE FOLLOWING IF RAISED BY THE EVIDENCE.[5]

[Meaning of "Without Consent"]

["Without consent," as used here, means that there was no consent in fact or that consent was given by (name of victim) because of fear caused by the defendant's use or threat of imminent use of physical violence on ((name of victim)) (on another person in the presence of (name of victim)) (on a member of (name of victim) 's immediate family).]

Meaning of "Forcibly"

"Forcibly" means that the defendant actually used force or threatened the use of imminent force to overcome or to prevent (name of victim) 's resistance to being transported.[6] "Imminent" means "near at hand" or "on the point of happening."[7]

ADD THE FOLLOWING IF RAISED BY THE EVIDENCE.[8]

["Forcibly" includes the (use of) (threat to use) force directed at a (third person in the presence of) (member of the immediate family of) (name of victim) if that (use of) (threat to use) force results in the transporting of (name of victim) from one place to another.]

Jury's Decision

If you are satisfied beyond a reasonable doubt that all four elements of this offense have been proved, you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.

ADD THE FOLLOWING[9] IF DEFENDANT HAS BEEN CHARGED UNDER § 940.31(2): COMMITTING THE OFFENSE WITH INTENT TO CAUSE

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ANOTHER TO TRANSFER PROPERTY TO OBTAIN THE VICTIM'S RELEASE.

If you find the defendant guilty of kidnapping, you must consider the following question:

"Did the defendant commit this offense with intent to cause another person to transfer money or other form of property[10] in order to obtain the release of (name of victim) ?"

Before you may answer this question "yes," the State must satisfy you beyond a reasonable doubt that the defendant committed this offense with the intent to cause another person to transfer money or other form of property in order to obtain the release of (name of victim) . You cannot look into a person's mind to find out intent. Intent must be found, if found at all, from the defendant's acts and words and statements, if any, bearing on his intent.

If you are satisfied beyond a reasonable doubt that the defendant committed this offense with the intent to cause another person to transfer money or other form of property in order to obtain the release of (name of victim) , you should answer this question "yes."

If you are not so satisfied, you must answer this question "no."

ADD THE FOLLOWING[11] IF THERE IS SOME EVIDENCE IN THE CASE THAT THE VICTIM WAS RELEASED WITHOUT PERMANENT PHYSICAL INJURY.

If you answer the first question "yes," you must consider the following question:

"Did the defendant fail to release (name of victim) without permanent physical injury (prior to the time the first witness was sworn at trial)?"[12]

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The burden is on the State to satisfy you beyond a reasonable doubt that the defendant did not release (name of victim) without permanent physical injury (prior to the first witness being sworn at trial).[13] If you are so satisfied, you should answer this question "yes."

If you are not so satisfied, you must answer this question "no."

COMMENT

Wis JI-Criminal 1280 was originally published in 1980 and revised in 1990 and 2006. This revision was approved by the Committee in June 2012; it involved nonsubstantive changes to the text and an addition to footnote 4.

Section 940.31 defines the offense of kidnapping and provides that it may be committed in three ways, see subsections (1)(a), (1)(b), and (1)(c). This instruction deals with an offense under subsection (1)(a). For violations of subsection (1)(b), see Wis JI-Criminal 1281. For violations of subsection (1)(c), see Wis JI-Criminal 1282.

Basic violations of § 940.31 are Class C felonies. This instruction also deals with the aggravating and mitigating factors provided for in subsection (2). The penalty classification for the offense is increased to a Class B felony if committed for ransom. The penalty classification for the aggravated offense is reduced back to a Class C felony if the victim is released without injury prior to trial. The Committee recommends handling both the aggravating and mitigating factors by submitting separate questions to the jury, see notes 9 and 11, below.

In State v. Simplot, 180 Wis.2d 383, 509 N.W.2d 338 (Ct. App. 1993), the court addressed the application of the kidnapping statute to a defendant who claimed to be acting as an agent of the parent of the child who was kidnapped. The defendant claimed he had a defense because a parent is immune from prosecution for kidnapping and he shared the same immunity when acting as the parents' agent. The Wisconsin Court of Appeals rejected this argument, adopting what the court characterized as the minority view which refuses to extend the parent's immunity to an agent.

Although kidnapping is sometimes referred to as "aggravated false imprisonment" (see, for example, 1953 Judiciary Committee Report on the Criminal Code, page 72), false imprisonment is not a lesser included offense of kidnapping. Geitner v. State, 59 Wis.2d 128, 207 N.W.2d 837 (1973).

1. The Committee believes the word "transport" is preferable to "carries" used in § 940.31.

2. Section 940.31(1)(a) requires that the victim be carried "from one place to another." One question that may arise is, how far must the victim be moved to sustain a charge of kidnapping? The question arises in at least two situations: 1) in determining whether an attempt or a completed crime has been committed; and 2) in determining whether the crime of kidnapping has been committed in addition to another offense which involved some movement of the victim. Most of the attention has focused on the latter situation, as where a robbery victim is forced to move from one place to another during the course of the robbery. The

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problem may not be as difficult in Wisconsin as it appears to be elsewhere, because the Wisconsin statute requires that the carrying "from one place to another" be done with intent that the victim be "secretly confined or imprisoned or to be carried out of his state or to be held to service . . . ." It may be that movement incidental to another criminal offense would not meet the intent requirements under our statute. However, the same questions may arise with regard to the nature of the confinement or imprisonment as with the movement: Is it extensive enough to constitute "kidnapping" or is it just a natural incident of the commission of another crime?

The Wisconsin Court of Appeals addressed this issue in State v. Simpson, 118 Wis.2d 454, 347 N.W.2d 920 (Ct. App. 1984). (Simpson was remanded on other grounds which were addressed in a decision reported at 125 Wis.2d 575, 373 N.W.2d 673 (Ct. App. 1985).) The case involved the defendant getting into the victim's car and driving into the country where a sexual assault was committed. Simpson appealed his convictions for kidnapping under § 940.31(1)(a) and sexual assault. One of his contentions was that the evidence was insufficient to support the kidnapping charge because any movement of the victim was "incidental" to the acts constituting the sexual assault.

Simpson based his argument on case law from several other states requiring that the "asportation of a kidnapping victim be non-incidental to any offense other than kidnapping." See 118 Wis.2d 454, 458, and cases cited. The court of appeals rejected the argument, finding that the Wisconsin Supreme Court had rejected it earlier in a case involving charges of abduction and sexual perversion. See Harris v. State, 78 Wis.2d 357, 254 N.W.2d 291 (1977). Rather than apply a special rule about "incidental" movement, the Wisconsin approach treats this problem like any other involving acts which form the basis for violation of more than one statute. Kidnapping and sexual assault are separate crimes for purposes of charging and conviction under §§ 939.65 and 939.71. So the test is whether the evidence establishes the facts necessary to constitute each crime. The court in Simpson found the evidence sufficient to establish the facts necessary to constitute kidnapping. 118 Wis.2d 454, 462-63.

The 1980 version of this instruction included the suggestion that a statement be added which in effect adopted the rule requiring "non-incidental" movement of the kidnapping victim. In light of Simpson and Harris, this suggestion was removed in the 1990 revision.

Also see, State v. Wagner, 191 Wis.2d 322, 328, 528 N.W.2d 85 (Ct. App. 1995), for a summary of cases discussing the "from one place to another" requirement.

3. Under § 939.23(4), "with intent that" is defined to mean "that the actor either has a purpose to do the thing or cause the result specified, or is aware that his or her conduct is practically certain to cause that result." See Wis JI-Criminal 923A and 923B for further discussion.

4. In State v. Clement, 153 Wis.2d 287, 450 N.W.2d 789 (Ct. App. 1989), the court held that the word "service" in the phrase "hold to service against his will" is unambiguous on its face: it "includes acts done at the command of another. It clearly embraces sexual acts performed at the command of another." 153 Wis.2d 287, 293. Also see, State v. Wagner, 191 Wis.2d 322, 329, 528 N.W.2d 85 (Ct. App. 1995). In State v. Denton, 2009 WI App 78, 319 Wis.2d 718, 768 N.W.2d 250, the court applied the Clement standard in rejecting the defendant's argument that "held to service" for purposes of kidnapping should be limited to "forced labor or involuntary servitude." The word "service" includes "acts done at the command of another." 319 Wis.2d 718, 739.

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5. "Without consent" is defined in § 939.22(48). The material in brackets reflects the rule stated in § 939.22(48)(a) and has been included because the use of force, required as an element of the crime of kidnapping, will often be relevant to the consent issue as well. When the bracketed material is used, additional explanation is recommended, especially where consent was given because of threats to a third person or family member.

6. This paragraph restates the statutory requirement that the defendant act "by force or threat of imminent force" by phrasing them as alternative ways of satisfying the core requirement that the defendant act "forcibly." The Committee has concluded that this properly emphasizes the intent of the statute to require a link between the transporting of the victim and the defendant's use of force. The Committee has concluded that it is not necessary to elect between "use of force" and "threat of imminent force" alternatives, although in the usual case election would clarify the issue for the jury and should be done where possible. In support of the proposition that election is not necessary, see Manson v. State, 92 Wis.2d 40, 284 N.W.2d 703 (Ct. App. 1979), and Holland v. State, 91 Wis.2d 134, 280 N.W.2d 288 (1979).

7. The definition of "imminent" is adapted from the one provided in Black's Law Dictionary, p. 884 (4th ed., 1981).

8. The seizing, confining, or restraining of the victim must be accomplished by force or threat of imminent force. The Committee has concluded that this element may be satisfied when the use or threat of force is directed at a third person or family member as well as if it is directed at the victim. This is based on analogy with the definition of "without consent" in § 939.22(48), see note 5, supra.

9. Section 940.31(2) provides for an increased penalty (from a Class C to a Class B felony) if the offense is committed for ransom. Where the aggravated offense is charged, the Committee recommends that a separate question be submitted to the jury if they find the defendant committed the basic offense. The following should be added to the standard verdict form:

If you find the defendant guilty, answer the following question "yes" or "no":

Did the defendant commit this offense with intent to cause another to transfer money or other form or property in order to obtain the release of (name of victim)?

10. The statute refers simply to the transfer of "property"; the Committee concluded that since money will be involved in most cases, it is proper to refer directly to "money" in the instruction. If further definition of "property" is required, see §§ 943.20(2) and 990.01(27) and (31).

11. Section 940.31(2) provides that where the defendant committed the offense for ransom (see note 9, supra), the penalty may be reduced back to the penalty for simple kidnapping (Class C felony) if the victim was released without permanent physical injury prior to the first witness being sworn at trial. This mitigating circumstance operates only if the defendant is found guilty of committing the offense for ransom.

The Committee recommends that the issue be handled by submitting a separate question to the jury if they find the defendant guilty of the aggravated offense of kidnapping for ransom. The following should be added to the verdict form (as amended, see note 9, supra):

If you answer this question "yes," answer the following question "yes" or "no":

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Did the defendant fail to release (name of victim) without permanent physical injury (prior to the time the first witness was sworn at trial)?

The Committee recommends the phrase in parentheses should be included only when the time of the release is an issue in the case, see note 12, below.

The additional instruction on the mitigating factor should be given whenever there is some evidence in the case that the victim was released without permanent physical injury. This evidence may be part of the state's case or may be presented by the defendant. The question is phrased in terms of the defendant's failure to release the victim in order to avoid any problems in shifting the burden of proof to the defendant. Once there is some evidence of a mitigating factor, the burden is on the state to prove the absence of that factor.

12. The Committee believes that the precise time of release of the victim will seldom be an issue and that the phrase in parentheses need not be read to the jury in most cases.

13. See note 12, supra.

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1281 KIDNAPPING — § 940.31(1)(b)

Statutory Definition of the Crime

Kidnapping, as defined in § 940.31(1)(b) of the Criminal Code of Wisconsin, is committed by one who, by force or threat of imminent force, seizes or confines another person without consent and with intent to cause (him) (her) to be secretly confined or imprisoned or to be carried out of this state or to be held to service against (his) (her) will.

State's Burden of Proof

Before you may find the defendant guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following four elements were present.

Elements of the Crime That the State Must Prove

1. The defendant (seized) (confined)[1] (name of victim).
2. The defendant (seized) (confined) (name of victim) without (his) (her) consent.
3. The defendant (seized) (confined) (name of victim) forcibly.
4. The defendant (seized) (confined) (name of victim) with intent that[2] (name of victim) be (secretly confined) (secretly imprisoned) (transported out of this state) (held to service against (his) (her) will).[3]

Deciding About Intent

You cannot look into a person's mind to find out intent. Intent must be found, if found at all, from the defendant's acts, words, ands statements, if any, and from all the facts and circumstances in this case bearing upon intent.[4]

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Meaning of "Confined" or "Restrained"[5]

Although this requires genuine restraint or confinement, it does not require that it be in a jail or prison. If the defendant deprived (name of victim) of freedom of movement, or compelled (him) (her) to remain where (he) (she) did not wish to remain, then (name of victim) was confined or restrained. The use of physical force is not required. One may be confined or restrained by acts or words or both.

ADD THE FOLLOWING IF THE ISSUE OF "ESCAPE" IS RAISED BY THE EVIDENCE:[6]

[A person is not confined or restrained if (he) (she) knew (he) (she) could have avoided it by taking reasonable action.]

[A reasonable opportunity to escape does not change confinement or restraint that has occurred.]

ADD THE FOLLOWING IF RAISED BY THE EVIDENCE.[7]

[Meaning of "Without Consent"]

["Without consent," as used here, means that there was no consent in fact or that consent was given by (name of victim) because of fear caused by the defendant's use or threat of imminent use of physical violence on ((name of victim)) (on another person in the presence of (name of victim)) (on a member of (name of victim) 's immediate family).]

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Meaning of "Forcibly"

"Forcibly" means that the defendant actually used force or threatened the use of imminent force to overcome or to prevent (name of victim) 's resistance to being (seized) (confined).[8] "Imminent" means "near at hand" or "on the point of happening."[9]

ADD THE FOLLOWING IF RAISED BY THE EVIDENCE.[10]

["Forcibly" includes the (use of) (threat to use) force directed at a (third person in the presence of) (member of the immediate family of) (name of victim) if that (use of) (threat to use) force results in the (seizing) (confining) of (name of victim) .

Jury's Decision

If you are satisfied beyond a reasonable doubt that all four elements of this offense have been proved, you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.

ADD THE FOLLOWING[11] IF DEFENDANT HAS BEEN CHARGED UNDER § 940.31(2): COMMITTING THE OFFENSE WITH INTENT TO CAUSE ANOTHER TO TRANSFER PROPERTY TO OBTAIN THE VICTIM'S RELEASE.

If you find the defendant guilty of kidnapping, you must consider the following question:

"Did the defendant commit this offense with intent to cause another person to transfer money or other form of property[12] in order to obtain the release of (name of victim) ?"

Before you may answer this question "yes," the State must satisfy you beyond a reasonable doubt that the defendant committed this offense with the intent to cause another

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person to transfer money or other form of property in order to obtain the release of (name of victim). You cannot look into a person's mind to find out intent. Intent must be found, if found at all, from the defendant's acts and words and statements, if any, bearing on his intent.

If you are satisfied beyond a reasonable doubt that the defendant committed this offense with the intent to cause another person to transfer money or other form of property in order to obtain the release of (name of victim), you should answer this question "yes."

If you are not so satisfied, you must answer this question "no."

ADD THE FOLLOWING[13] IF THERE IS SOME EVIDENCE IN THE CASE THAT THE VICTIM WAS RELEASED WITHOUT PERMANENT PHYSICAL INJURY.

If you answer the first question "yes," you must consider the following question:

"Did the defendant fail to release (name of victim) without permanent physical injury (prior to the time the first witness was sworn at trial)?"[14]

The burden is on the State to satisfy you beyond a reasonable doubt that the defendant did not release (name of victim) without permanent physical injury (prior to the first witness being sworn at trial).[15] If you are so satisfied, you should answer this question "yes."

If you are not so satisfied, you must answer this question "no."

COMMENT

Wis JI-Criminal 1281 was originally published in 1980 and revised in 1990 and 2006. This revision was approved by the Committee in June 2015; it involved a nonsubstantive change to the text and additions to footnotes 3 and 6.

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Section 940.31 defines the offense of kidnapping and provides that it may be committed in three ways, see subsections (1)(a), (1)(b), and (1)(c). This instruction deals with an offense under subsection (1)(b). For violations of subsection (1)(a), see Wis JI-Criminal 1280. For violations of subsection (1)(c), see Wis JI-Criminal 1282.

Basic violations of §940.31 are Class C felonies. This instruction also deals with the aggravating and mitigating factors provided for in subsection (2). The penalty classification for the offense is increased to a Class B felony if committed for ransom. The penalty classification for the aggravated offense is reduced back to a Class C felony if the victim is released without injury prior to trial. The Committee recommends handling both the aggravating and mitigating factors by submitting separate questions to the jury, see notes 11 and 13, below.

In State v. Simplot, 180 Wis.2d 383, 509 N.W.2d 338 (Ct. App. 1993), the court addressed the application of the kidnapping statute to a defendant who claimed to be acting as an agent of the parent of the child who was kidnapped. The defendant claimed he had a defense because a parent is immune from prosecution for kidnapping and he shared the same immunity when acting as the parents' agent. The Wisconsin Court of Appeals rejected this argument, adopting what the court characterized as the minority view which refuses to extend the parent's immunity to an agent.

Although kidnapping is sometimes referred to as "aggravated false imprisonment" (see, for example, 1953 Judiciary Committee Report on the Criminal Code, page 72), false imprisonment is not a lesser included offense of kidnapping. Geitner v. State, 59 Wis.2d 128, 207 N.W.2d 837 (1973).

1. The Committee recommends that one of the alternatives be elected but does not conclude that an instruction joining the two alternatives in the disjunctive would be error. See Clark v. State, 92 Wis.2d 617, 642, 286 N.W.2d 344 (1979), and discussion at note 8, below.

2. Under § 939.23(4), "with intent that" is defined to mean "that the actor either has a purpose to do the thing or cause the result specified, or is aware that his or her conduct is practically certain to cause that result." See Wis JI-Criminal 923A and 923B for further discussion.

3. In State v. Clement, 153 Wis.2d 287, 450 N.W.2d 789 (Ct. App. 1989), the court held that the word "service" in the phrase "hold to service against his will" is unambiguous on its face: it "includes acts done at the command of another. It clearly embraces sexual acts performed at the command of another." 153 Wis.2d 287, 293. Also see, State v. Wagner, 191 Wis.2d 322, 329, 528 N.W.2d 85 (Ct. App. 1995). In State v. Denton, 2009 WI App 78, 319 Wis.2d 718, 768 N.W.2d 250, the court applied the Clement standard in rejecting the defendant's argument that "held to service" for purposes of kidnapping should be limited to "forced labor or involuntary servitude." The word "service" includes "acts done at the command of another." 319 Wis.2d 718, 739.

4. The basis for the knowledge requirement in the fifth element is the provision in § 939.23(3) which states that when the word "intentionally" is used in a criminal statute, it requires "knowledge of those facts which are necessary to make his or her conduct criminal and which are set forth after the word 'intentionally'."

5. The definition of "confined or restrained" is the one used in Wis JI-Criminal 1275 False Imprisonment. In State v. Burroughs, 2002 WI App 18, 250 Wis.2d 180, 640 N.W.2d 190, the court viewed

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"the false imprisonment statute as a cousin to Wis. Stat. s. 940.31(1), the kidnapping statute. . . . We therefore are satisfied that the definition of 'confine' as set forth in Wis JI-Criminal 1275 is also appropriate for cases alleging kidnapping pursuant to s. 940.31." ¶19.

6. As with the definition of "confined or restrained" — see footnote 5, supra — the bracketed paragraphs are based on Wis JI-Criminal 1275, False Imprisonment. One or both should be used only when the issue of "escape" is raised by the evidence. They replace a statement in the 1971 version of Wis JI-Criminal 1275 to the effect that "if there is some reasonable means of escape, there is no confinement or restraint." The Committee concluded that this statement was potentially confusing if literally applied. The word "escape" implies leaving a situation of confinement or restraint. Yet once there is confinement or restraint, that aspect of the crime of false imprisonment — or kidnapping — is complete, and a later escape would not affect it. This is the concept expressed in the second bracketed paragraph.

In the Committee's judgment, the relevance of escape is more accurately expressed in terms of actions that could reasonably have been taken to avoid confinement or restraint. This is the concept expressed in the first bracketed paragraph.

The "reasonable means of escape" issue as it applies to false imprisonment was discussed in State v. C.V.C., 153 Wis.2d 145, 450 N.W.2d 463 (Ct. App. 1989). The court relied on a standard from the Restatement of Torts to determine whether a victim had a "reasonable means of escape":

> Since the actor has intended to imprison the other, the other is not required to run any risk of harm to his person or to his chattels or of subjecting himself to any substantial liability to a third person in order to relieve the actor from a liability to which his intentional misconduct has subjected him. So too, even though there may be a perfectly safe avenue of escape, the other is not required to take it if the circumstances are such as to make it offensive to a reasonable sense of decency or personal dignity.

Restatement (Second) of Torts, sec. 36 comment a. (1978).

The standard had previously been applied in a civil false imprisonment case. Herbst v. Wuennenberg, 83 Wis.2d 768, 778-79, 266 N.W.2d 391 (1978). In C.V.C., the court concluded that "the victim was not required to take steps dangerous to herself or offensive to a reasonable sense of decency or personal dignity to free herself in order for the state to prove restraint or confinement. . . ." 153 Wis.2d 145, 150. Also see the Comment to § 340.25 in Volume V 1953 Judiciary Committee Report on the Criminal Code, Wisconsin Legislative Council, page 71 (February 1953).

7. "Without consent" is defined in § 939.22(48). The material in brackets reflects the rule stated in § 939.22(48)(a) and has been included because the use of force, required as an element of the crime of kidnapping, will often be relevant to the consent issue as well. When the bracketed material is used, additional explanation is recommended, especially where consent was given because of threats to a third person or family member.

8. This paragraph restates the statutory requirement that the defendant act "by force or threat of imminent force" by phrasing them as alternative ways of satisfying the core requirement that the defendant act "forcibly." The Committee has concluded that this properly emphasizes the intent of the statute to require a link between the transporting of the victim and the defendant's use of force. The Committee has concluded

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that it is not necessary to elect between "use of force" and "threat of imminent force" alternatives, although in the usual case election would clarify the issue for the jury and should be done where possible. In support of the proposition that election is not necessary, see Manson v. State, 92 Wis.2d 40, 284 N.W.2d 703 (Ct. App. 1979), and Holland v. State, 91 Wis.2d 134, 280 N.W.2d 288 (1979).

9. The definition of "imminent" is adapted from the one provided in Black's Law Dictionary, p. 884 (4th ed., 1981).

10. The seizing, confining, or restraining of the victim must be accomplished by force or threat of imminent force. The Committee has concluded that this element may be satisfied when the use or threat of force is directed at a third person or family member as well as if it is directed at the victim. This is based on analogy with the definition of "without consent" in § 939.22(48), see note 7, supra.

11. Section 940.31(2) provides for an increased penalty (from a Class C to a Class B felony) if the offense is committed for ransom. Where the aggravated offense is charged, the Committee recommends that a separate question be submitted to the jury if they find the defendant committed the basic offense. The following should be added to the standard verdict form:

If you find the defendant guilty, answer the following question "yes" or "no":

Did the defendant commit this offense with intent to cause another to transfer money or other form or property in order to obtain the release of (name of victim)?

12. The statute refers simply to the transfer of "property"; the Committee concluded that since money will be involved in most cases, it is proper to refer directly to "money" in the instruction. If further definition of "property" is required, see §§ 943.20(2) and 990.01(27) and (31).

13. Section 940.31(2) provides that where the defendant committed the offense for ransom (see note 11, supra), the penalty may be reduced back to the penalty for simple kidnapping (Class C felony) if the victim was released without permanent physical injury prior to the first witness being sworn at trial. This mitigating circumstance operates only if the defendant is found guilty of committing the offense for ransom.

The Committee recommends that the issue be handled by submitting a separate question to the jury if they find the defendant guilty of the aggravated offense of kidnapping for ransom. The following should be added to the verdict form (as amended, see note 11, supra):

If you answer this question "yes," answer the following question "yes" or "no":

Did the defendant fail to release (name of victim) without permanent physical injury (prior to the time the first witness was sworn at trial)?

The Committee recommends the phrase in parentheses should be included only when the time of the release is an issue in the case, see note 14, below.

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The additional instruction on the mitigating factor should be given whenever there is some evidence in the case that the victim was released without permanent physical injury. This evidence may be part of the state's case or may be presented by the defendant. The question is phrased in terms of the defendant's failure to release the victim in order to avoid any problems in shifting the burden of proof to the defendant. Once there is some evidence of a mitigating factor, the burden is on the state to prove the absence of that factor.

14. The Committee believes that the precise time of release of the victim will seldom be an issue and that the phrase in parentheses need not be read to the jury in most cases.

15. See note 14, supra.

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1282 KIDNAPPING — § 940.31(1)(c)

Statutory Definition of the Crime

Kidnapping, as defined in § 940.31(1)(c) of the Criminal Code of Wisconsin, is committed by one who by deceit induces another person to go from one place to another with intent to cause (him) (her) to be secretly confined or imprisoned or to be carried out of this state or to be held to service against (his) (her) will.

State's Burden of Proof

Before you may find the defendant guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following three elements were present.

Elements of the Crime That the State Must Prove

1. The defendant induced (name of victim) to go from one place to another.[1]

2. The defendant induced (name of victim) to go from one place to another by deceit.

   ["By deceit" requires that the defendant induced (name of victim) to go from one place to another by (making a false statement) (giving a false impression).][2]

3. The defendant induced (name of victim) to go from one place to another with intent that[3] (name of victim) be (secretly confined) (secretly imprisoned) (transported out of this state) (held to service against (his) (her) will).[4]

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Deciding About Intent

You cannot look into a person's mind to find out intent. Intent must be found, if found at all, from the defendant's acts, words, ands statements, if any, and from all the facts and circumstances in this case bearing upon intent.

Jury's Decision

If you are satisfied beyond a reasonable doubt that all three elements of this offense have been proved, you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.

ADD THE FOLLOWING[5] IF DEFENDANT HAS BEEN CHARGED UNDER § 940.31(2): COMMITTING THE OFFENSE WITH INTENT TO CAUSE ANOTHER TO TRANSFER PROPERTY TO OBTAIN THE VICTIM'S RELEASE.

If you find the defendant guilty of kidnapping, you must consider the following question:

"Did the defendant commit this offense with intent to cause another person to transfer money or other form of property[6] in order to obtain the release of (name of victim) ?"

Before you may answer this question "yes," the State must satisfy you beyond a reasonable doubt that the defendant committed this offense with the intent to cause another person to transfer money or other form of property in order to obtain the release of (name of victim) . You cannot look into a person's mind to find out intent. Intent must be found, if found at all, from the defendant's acts and words and statements, if any, bearing on his intent.

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If you are satisfied beyond a reasonable doubt that the defendant committed this offense with the intent to cause another person to transfer money or other form of property in order to obtain the release of (name of victim), you should answer this question "yes."

If you are not so satisfied, you must answer this question "no."

ADD THE FOLLOWING[7] IF THERE IS SOME EVIDENCE IN THE CASE THAT THE VICTIM WAS RELEASED WITHOUT PERMANENT PHYSICAL INJURY.

If you answer the first question "yes," you must consider the following question:

"Did the defendant fail to release (name of victim) without permanent physical injury (prior to the time the first witness was sworn at trial)?"[8]

The burden is on the State to satisfy you beyond a reasonable doubt that the defendant did not release (name of victim) without permanent physical injury (prior to the first witness being sworn at trial).[9] If you are so satisfied, you should answer this question "yes."

If you are not so satisfied, you must answer this question "no."

COMMENT

Wis JI-Criminal 1282 was originally published in 1980 and revised in 1990. This revision was approved by the Committee in April 2006 and involved adoption of a new format and nonsubstantive changes to the text.

Section 940.31 defines the offense of kidnapping and provides that it may be committed in three ways, see subsections (1)(a), (1)(b), and (1)(c). This instruction deals with an offense under subsection (1)(c). For violations of subsection (1)(a), see Wis JI-Criminal 1280. For violations of subsection (1)(b), see Wis JI-Criminal 1281.

Basic violations of §940.31 are Class C felonies. This instruction also deals with the aggravating and mitigating factors provided for in subsection (2). The penalty classification for the offense is increased to a Class B felony if committed for ransom. The penalty classification for the aggravated offense is reduced back to a Class C felony if the victim is released without injury prior to trial. The Committee recommends

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handling both the aggravating and mitigating factors by submitting separate questions to the jury, see notes 9 and 11, below.

In State v. Simplot, 180 Wis.2d 383, 509 N.W.2d 338 (Ct. App. 1993), the court addressed the application of the kidnapping statute to a defendant who claimed to be acting as an agent of the parent of the child who was kidnapped. The defendant claimed he had a defense because a parent is immune from prosecution for kidnapping and he shared the same immunity when acting as the parents' agent. The Wisconsin Court of Appeals rejected this argument, adopting what the court characterized as the minority view which refuses to extend the parent's immunity to an agent.

Although kidnapping is sometimes referred to as "aggravated false imprisonment" (see, for example, 1953 Judiciary Committee Report on the Criminal Code, page 72), false imprisonment is not a lesser included offense of kidnapping. Geitner v. State, 59 Wis.2d 128, 207 N.W.2d 837 (1973).

1. Section 940.31(1)(c) requires that the victim be induced to move "from one place to another." A question may arise as to how far the victim must be moved to sustain a charge of kidnapping. See discussion of this issue at note 2, Wis JI-Criminal 1280.

2. The term "deceit" as used in sec. 940.31(1)(c) was discussed in State v. Dalton, 98 Wis.2d 725, 298 N.W.2d 398 (Ct. App. 1980). Dalton appealed his conviction, claiming that he could not be convicted absent proof of express or implied misrepresentations. The court rejected his argument, holding that the use of "deceit," without further statutory definition shows legislative intent to avoid limiting it to express or implied misrepresentations. Rather, the legislature intended to proscribe "wily and cunning stratagems that are contrived to delude the victim and conceal the violator's intent to effectuate the crime" of kidnapping. 98 Wis.2d 725, 741.

At common law, "deceit" was generally used as an equivalent of "fraud" and typically had the following elements: a false representation; made with intent to induce another to act; relied on by another person; to the damage of that person. In general, see Wis JI-Civil 2401 and cases cited therein. Also see 37 Am.Jur.2d Fraud and Deceit (1968). This amounts to using a false representation or other deceptive practice. The Committee concluded the two alternatives in parentheses adequately cover the likely application of "by means of deceit." Garner, A Dictionary of Modern Legal Usage, 2d Edition (Oxford University Press 1995), defines deceit as the "act of giving a false impression."

3. Under § 939.23(4), "with intent that" is defined to mean "that the actor either has a purpose to do the thing or cause the result specified, or is aware that his or her conduct is practically certain to cause that result." See Wis JI-Criminal 923A and 923B for further discussion.

4. In State v. Clement, 153 Wis.2d 287, 450 N.W.2d 789 (Ct. App. 1989), the court held that the word "service" in the phrase "hold to service against his will" is unambiguous on its face: it "includes acts done at the command of another. It clearly embraces sexual acts performed at the command of another." 153 Wis.2d 287, 293. Also see, State v. Wagner, 191 Wis.2d 322, 329, 528 N.W.2d 85 (Ct. App. 1995).

5. Section 940.31(2) provides for an increased penalty (from a Class C to a Class B felony) if the offense is committed for ransom. Where the aggravated offense is charged, the Committee recommends that a separate question be submitted to the jury if they find the defendant committed the basic offense. The following should be added to the standard verdict form:

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If you find the defendant guilty, answer the following question "yes" or "no":

Did the defendant commit this offense with intent to cause another to transfer money or other form or property in order to obtain the release of (name of victim) ?

6. The statute refers simply to the transfer of "property"; the Committee concluded that since money will be involved in most cases, it is proper to refer directly to "money" in the instruction. If further definition of "property" is required, see §§ 943.20(2) and 990.01(27) and (31).

7. Section 940.31(2) provides that where the defendant committed the offense for ransom (see note 5, supra), the penalty may be reduced back to the penalty for simple kidnapping (Class C felony) if the victim was released without permanent physical injury prior to the first witness being sworn at trial. This mitigating circumstance operates only if the defendant is found guilty of committing the offense for ransom.

The Committee recommends that the issue be handled by submitting a separate question to the jury if they find the defendant guilty of the aggravated offense of kidnapping for ransom. The following should be added to the verdict form (as amended, see note 5, supra):

If you answer this question "yes," answer the following question "yes" or "no":

Did the defendant fail to release (name of victim) without permanent physical injury (prior to the time the first witness was sworn at trial)?

The Committee recommends the phrase in parentheses should be included only when the time of the release is an issue in the case, see note 8, below.

The additional instruction on the mitigating factor should be given whenever there is some evidence in the case that the victim was released without permanent physical injury. This evidence may be part of the state's case or may be presented by the defendant. The question is phrased in terms of the defendant's failure to release the victim in order to avoid any problems in shifting the burden of proof to the defendant. Once there is some evidence of a mitigating factor, the burden is on the state to prove the absence of that factor.

8. The Committee believes that the precise time of release of the victim will seldom be an issue and that the phrase in parentheses need not be read to the jury in most cases.

9. See note 8, supra.

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1283A PLACING A GLOBAL POSITIONING DEVICE — § 940.315(1)(a)

Statutory Definition of the Crime

Section 940.315(1)(a) of the Criminal Code of Wisconsin is violated by a person who places a global positioning device or a device equipped with global positioning technology on a vehicle owned or leased by another person without that person's consent.

State's Burden of Proof

Before you may find the defendant guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following two elements were present.

Elements of the Crime That the State Must Prove

1. The defendant placed [a global positioning device[1]] [a device equipped with global positioning technology] on a vehicle owned or leased by another person.
2. The defendant placed that device without the person's consent.[2]

Jury's Decision

If you are satisfied beyond a reasonable doubt that both elements of this offense have been proved, you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.

COMMENT

Wis JI-Criminal 1283A was approved by the Committee in October 2015.

Wis JI-Criminal 1283A is drafted for a violation of § 940.315(1)(a) — a Class A misdemeanor. For violations of § 940.315(1)(b) see Wis JI-Criminal 1283B.

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Section 940.315 was created by 2015 Wisconsin Act 45 [effective date: July 3, 2015].

Subsection (2) of § 940.315 sets forth several situations where the prohibition of sub. (1) does not apply: installation of a device by a manufacturer, by law enforcement officers acting in an official capacity, parents tracking the location or movement of a minor child, etc. The general rule in Wisconsin is that an exception which appears in a separate section of the statute is a matter of defense which the prosecution need not anticipate in the pleadings. State v. Harrison, 260 Wis. 89,92, 250 N.W.2d 38 (1951). Kreutzer v. Westfahl, 187 Wis. 463, 477, 204 N.W. 595(1925).

These situations are best handled, in the Committee's judgment, in the same manner as "affirmative defenses." That is, they are not issues in the case until there is some evidence of their existence. Once there is evidence sufficient to raise the issue, the burden is on the state to prove, beyond a reasonable doubt, that the defense, or the exception, is not present. See Moes v. State, 91 Wis.2d 756, 284 N.W.2d 66 (1979); State v. Schultz, 102 Wis.2d 423, 307 N.W.2d 151 (1981).

1. Section 940.315 does not define "global positioning device." A definition of "global positioning system tracking" is provided at sub.(1)(b) of §§ 301.48 and 301.49.

2. For a definition of "without consent" see § 939.22(48) and Wis JI-Criminal 948.

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1283B OBTAINING INFORMATION GENERATED BY A GLOBAL POSITIONING DEVICE — § 940.315(1)(b)

Statutory Definition of the Crime

Section 940.315(1)(b) of the Criminal Code of Wisconsin is violated by a person who intentionally obtains information regarding another person's movement or location generated by a global positioning device or a device equipped with global positioning technology that has been placed without that person's consent.

State's Burden of Proof

Before you may find the defendant guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following four elements were present.

Elements of the Crime That the State Must Prove

1. The defendant obtained information regarding another person's movement or location generated by [a global positioning device[1]] [a device equipped with global positioning technology].
2. The device was placed without the person's consent.[2]
3. The defendant knew that the device was placed without the other person's consent.[3]
4. The defendant acted intentionally.[4]

   This requires that the defendant acted with the purpose to obtain information regarding another person's movement or location generated by [a

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global positioning device] [a device equipped with global positioning technology].

Deciding About Purpose and Knowledge

You cannot look into a person's mind to find purpose or knowledge. Purpose and knowledge must be found, if found at all, from the defendant's acts, words, and statements, if any, and from all the facts and circumstances in this case bearing upon purpose and knowledge.

Jury's Decision

If you are satisfied beyond a reasonable doubt that all four elements of this offense have been proved, you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.

COMMENT

Wis JI-Criminal 1283B was approved by the Committee in October 2015.

Wis JI-Criminal 1283B is drafted for a violation of § 940.315(1)(b) — a Class A misdemeanor. For violations of § 940.315(1)(a) see Wis JI-Criminal 1283A.

Section 940.315 was created by 2015 Wisconsin Act 45 [effective date: July 3, 2015].

Subsection (2) of § 940.315 sets forth several situations where the prohibition of sub. (1) does not apply: installation of a device by a manufacturer, by law enforcement officers acting in an official capacity, parents tracking the location or movement of a minor child, etc. The general rule in Wisconsin is that an exception which appears in a separate section of the statute is a matter of defense which the prosecution need not anticipate in the pleadings. State v. Harrison, 260 Wis. 89,92, 250 N.W.2d 38 (1951). Kreutzer v. Westfahl, 187 Wis. 463, 477, 204 N.W. 595(1925).

These situations are best handled, in the Committee's judgment, in the same manner as "affirmative defenses." That is, they are not issues in the case until there is some evidence of their existence. Once there is evidence sufficient to raise the issue, the burden is on the state to prove, beyond a reasonable doubt, that

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the defense, or the exception, is not present. See Moes v. State, 91 Wis.2d 756, 284 N.W.2d 66 (1979); State v. Schultz, 102 Wis.2d 423, 307 N.W.2d 151 (1981).

1. Section 940.315 does not define "global positioning device." A definition of "global positioning system tracking" is provided at sub.(1)(b) of §§ 301.48 and 301.49.

2. For a definition of "without consent" see § 939.22(48) and Wis JI-Criminal 948.

3. "Intentionally" is defined in § 939.23(3) to require "knowledge of those facts which are necessary to make his or her conduct criminal and which are set forth after the word 'intentionally.'" Here, this requires knowledge that the other person did not consent. Regarding the meaning of "intentionally" see Wis JI-Criminal 923A and B.

4. "Intentionally" is defined in § 939.23(3) to require "a purpose to do the thing or cause the result specified, or is aware that his or her conduct is practically certain to cause that result." The Committee believes that the "mental purpose" alternative is most likely to apply in the context of this offense.

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1284 STALKING — § 940.32(2)

[USE FOR OFFENSES COMMITTED ON OR AFTER APRIL 27, 2004]

Statutory Definition of the Crime

Stalking, as defined in § 940.32(2) of the Criminal Code of Wisconsin, is committed by one who intentionally engages in a course of conduct directed at a specific person that causes that person [to suffer serious emotional distress] [to fear bodily injury or death to (himself) (herself) (a member of (his) (her) (family) (household)] and that would cause a reasonable person [to suffer serious emotional distress] [to fear bodily injury or death to (himself) (herself) (a member of (his) (her) (family) (household)] and where the actor knows or should know that the conduct will [cause the person to suffer serious emotional distress] [place the person in reasonable fear of bodily injury or death to (himself) (herself) (a member of (his) (her) (family) (household)].[1]

State's Burden of Proof

Before you may find the defendant guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following four elements were present.

Elements of the Crime That the State Must Prove

1. The defendant intentionally engaged in a course of conduct directed at (name of person).

   "Intentionally" requires that the defendant acted with the purpose[2] to engage in a course of conduct directed at (name of person).

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"Course of conduct" means a series of two or more acts carried out over time, however short or long, that show a continuity of purpose.[3] Acts that you may find constitute a course of conduct are limited to: (identify acts listed in § 940.32(1)(a)1.-10 that are supported by the evidence.).[4]

2. The course of conduct would have caused a reasonable person [to suffer serious emotional distress] [to fear bodily injury or death to (himself) (herself) (a member of (his) (her) (family) (household)].

["Suffer serious emotional distress" means to feel terrified, intimidated, threatened, harassed, or tormented. This does not require that (name of person) received treatment from a mental heath professional.][5]

["Member of a family" means a spouse, parent, child, sibling, or any other person who is related by blood or adoption to another.][6]

["Member of a household" means a person (who regularly resides in the household of another) (who within the previous 6 months regularly resided in the household of another).][7]

To determine whether this element is established, the standard is what effect the course of conduct would have had on a person of ordinary intelligence and prudence in the position of (name of person) under the circumstances that existed at the time of the course of conduct.

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3. The defendant's acts[8] [caused (name of person) to suffer serious emotional distress] [induced fear in (name of person) of bodily injury or death to (himself) (herself) (a member of (his) (her) (family) (household)].

4. The defendant knew or should have known that at least one of the acts constituting the course of conduct would [cause (name of person) to suffer serious emotional distress] [place (name of person) in reasonable fear of bodily injury or death to (himself) (herself) (a member of (his) (her) (family) (household)].[9]

Deciding About Intent and Knowledge

You cannot look into a person's mind to find intent and knowledge. Intent and knowledge must be found, if found at all, from the defendant's acts, words, and statements, if any, and from all the facts and circumstances in this case bearing upon intent and knowledge.

Jury's Decision

If you are satisfied beyond a reasonable doubt that all four elements of this offense have been proved, you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.

COMMENT

Wis JI-Criminal 1284 was originally published in 1994 and revised in 1999, 2003, 2004, 2010, and 2011. This revision was approved by the Committee in February 2013; it added reference to State v. Hemmingway to the comment.

2003 Wisconsin Act 222 amended § 940.32(2) to add causing a person to "suffer serious emotional distress" and changing the mental state requirement addressed in the fourth element from "intends" to "knows or should know." The effective date of the statute is April 27, 2004.

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Section 940.32 was created by 1993 Wisconsin Act 96. As originally enacted, it was adapted from a model "anti-stalking code for the states" prepared by the National Institute of Justice (NIJ) and the National Criminal Justice Association. The model and its development are described in an NIJ Research Report, "Project To Develop a Model Anti-Stalking Code for the States," October 1993 (NCJ 144477).

Section 940.32 was extensively amended by 2001 Wisconsin Act 109, effective date: July 30, 2002. The revised statute defines two offenses: violations of sub. (2) are addressed by this instruction; violations of sub. (2e) are addressed by Wis JI-Criminal 1284B. Subsections (2m) and (3) provide for an increase in the penalty if specified facts accompany a violation of sub. (2). See Wis JI-Criminal 1284A.

The constitutionality of § 940.32 as originally enacted was upheld in State v. Ruesch, 214 Wis.2d 548, 571 N.W.2d 898 (Ct. App. 1997), the first published decision dealing with the stalking statute. Claims based on overbreadth, vagueness, and equal protection were all rejected.

The defendant in Ruesch also claimed that sub. (4) of § 940.32, which states that "[t]his section does not apply to conduct that is or acts that are protected by the person's right to freedom of speech or to peaceably assemble with others under the state and U.S. constitutions . . .," creates an element of the crime. The court disagreed, holding that "[b]ecause subsection (4) provides no elements of the crime of stalking, it plays no role in the State's burden of proof at trial." 214 Wis.2d 547, 555.

In State v. Hemmingway, 2012 WI App 133, ___ Wis.2d ___, ___ N.W.2d ___ [No. 2011AP2372-CR], the court of appeals addressed how freedom of speech relates to stalking charges. The court reversed a trial court order that had dismissed a stalking charge on the ground that the statute was overbroad. The court of appeals held: "The First Amendment does not protect intentional conduct designed to cause serious emotional distress or fear of bodily harm or death in a targeted victim." ¶1.

Section 947.013 defines similar offenses by penalizing violations of harassment restraining orders. See Wis JI-Criminal 1910, 1911, and 1912.

1. The statement of the offense in the first paragraph of the instruction is a paraphrase of the statute, which begins: "whoever meets all the following criteria . . ." Those criteria are redundant and overlapping. In the Committee's judgment, the statute requires:

(a) a course of conduct directed at a specific person;
(b) the course of conduct would cause serious emotional distress or fear of bodily injury or death in a reasonable person;
(c) the acts caused serious emotional distress or fear of bodily injury or death in a specific person; and
(d) the defendant knew or should have known that at least one of the acts would cause that person to suffer serious emotional distress or place that person in reasonable fear.

2. "Intentionally" requires either mental purpose to cause the result specified or awareness that one's conduct is practically certain to cause the result. § 939.23(3). The Committee concluded that the mental purpose alternative is most likely to apply to this offense. See Wis JI-Criminal 923A and 923B for elaboration on the two alternatives.

3. The definition of "course of conduct" is the one provided in § 940.32(1)(a). 2001 Wisconsin Act 109 revised the definition to provide a list of different types of actions that the course of conduct "may

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include." Before the revision, "course of conduct" was defined as "maintaining a visual or physical proximity," an alternative that is retained in § 940.32(1)(a)1. For a case reviewing the sufficiency of the evidence on this factor, see State v. Sveum, 220 Wis.2d 396, 584 N.W.2d 137 (Ct. App. 1998).

4. Here specify the type of conduct alleged to be involved in the case and supported by the evidence, based on the list provided in subd. 1. through 9. of § 940.32(1)(a). The list of types of conduct is preceded by the statement: ". . . including any of the following: . . ." The Committee concluded that this means that acts constituting the course of conduct are limited to the types listed. Subdivision 10. of § 940.32(1)(a) extends the coverage of the statute to "causing a person to engage in any of the acts described in subds. 1. to 9."

2003 Wisconsin Act 222 added to the list in subds. 1. through 10 by creating subd. 6m.:

> 6m. Photographing, videotaping, audiotaping, or through any other electronic means, monitoring or recording the activities of the victim. This subdivision applies regardless of where the act occurs.

In 2010, the Committee reviewed its conclusion that acts constituting the course of conduct were limited to the types listed. Usually, when a statute introduces a list with "including," that indicates that the list is non-exhaustive. But in this statute the meaning appeared to be ambiguous, especially in light of the overall introduction to the crime definition which begins "whoever meets all of the following criteria." The Committee reviewed the legislative history and found that it did not resolve the ambiguity; while it showed an intent to broaden the coverage of the statute it also showed that some options were considered and not included. Further, two sections of the statute clearly appear to be limited to acts enumerated in the list. Subdivision 10. of § 940.32(1)(a) extends liability to "causing a person to engage in any of the acts described in subds. 1. to 9." Subsection (2e) is also limited to one who "engages in any of the acts listed in sub. (1)(a)1. to 10." The review convinced the Committee to reaffirm the original conclusion.

5. The definition of "suffer serious emotional distress" is provided in § 940.32(1)(d), which was created by 2003 Wisconsin Act 222. The statement that receiving treatment is not required is based on § 940.32(3m), was also created by Act 222, which reads as follows:

> (3m) A prosecutor need not need [sic] show that a victim received or will receive treatment from a mental health professional in order to prove that the victim suffered serious emotional distress under sub. (2)(c) or (2e)(c).

6. This is the definition provided in § 940.32(1)(cb).

7. This is the definition provided in § 940.32(1)(cd).

8. This element is based on § 940.32(2)(c) and thus refers to the defendant's "acts" rather than to "course of conduct," the phrase used in the other elements. Because the legislature used different terms in the different subsections, they are assumed to have different meanings. "[T]he evidence is sufficient to support a stalking conviction if the victim's knowledge of one of the actor's acts induces fear in the victim." State v. Sveum, 220 Wis.2d 396, 413-414, 584 N.W.2d 137 (Ct. App. 1998).

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9. 2003 Wisconsin Act 222 amended § 940.32(2)(b) to require that the actor "knows or should know that at least one of the acts that constitute the course of conduct will cause the specific person to suffer serious emotional distress or place the specific person in reasonable fear . . ." Before that amendment, the statute had required that "the actor intends . . ." This restores § 940.32 to the way it read when originally enacted; it required that the defendant "knew or should have known . . ." 2001 Wisconsin Act 109 had amended § 940.32(2)(b) to substitute "intends."

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1284A STALKING: PENALTY FACTORS — § 940.32(2m) and (3)

ADD ONE OF THE FOLLOWING QUESTIONS TO WIS JI-CRIMINAL 1284 IF ONE OF THE PENALTY FACTORS SET FORTH IN SUBS. (2m) OR (3) IS CHARGED AND THE EVIDENCE WOULD SUPPORT A FINDING THAT THE FACTOR IS ESTABLISHED.[1]

If you find the defendant guilty, you must answer the following question(s):

FOR CHARGES UNDER SUB. (2m)(a)

[Did the defendant have a previous conviction for (identify the crime)[2]?]

FOR CHARGES UNDER SUB. (2m)(b)

[Did the defendant have a previous conviction for a crime?

Was the victim of that crime the victim of the crime in this case?

Did the crime in this case occur within 7 years after the previous conviction?][3]

FOR CHARGES UNDER SUB. (2m)(c)

[Did the defendant intentionally (gain access to) (cause another person to gain access to) a record in electronic format that contained personally identifiable information regarding the victim in order to facilitate the crime in this case?][4]

FOR CHARGES UNDER SUB. (2m)(d)

[Did the defendant violate [§ 968.31(1)] [§ 968.34(1)] in order to facilitate the crime in this case? Section [968.31(1)] [968.34(1)] is violated by one who (define the alleged crime).][5]

FOR CHARGES UNDER SUB. (2m)(e)

[Was (name of victim) under the age of 18 years at the time of the crime?]

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FOR CHARGES UNDER SUB. (3)(a)

[Did the act result in bodily harm to [(name of victim)] [a member of (name of victim) 's (family)[6] (household)[7]]?

"Bodily harm" means physical pain or injury, illness, or any impairment of physical condition.[8]]

FOR CHARGES UNDER SUB. (3)(b)

[Did the defendant have a previous conviction for (identify the crime) [9]?]

Was the victim of that crime the victim of the crime in this case?

Did the crime in this case occur within 7 years after the previous conviction?]

FOR CHARGES UNDER SUB. (3)(c)

[Did the defendant use a dangerous weapon in carrying out an act of (identify act listed in sub. (1)(a)1. to 9.) ?

"Dangerous weapon" means (see Wis JI-Criminal 910) .]

CONTINUE WITH THE FOLLOWING IN ALL CASES

Before you may answer "yes," you must be satisfied beyond a reasonable doubt that the answer to that question is "yes."

If you are not so satisfied, you must answer the question "no."

COMMENT

Wis JI-Criminal 1284A was originally published in 2003 and revised in 2010. This revision was approved by the Committee in February 2011; it involved updating the Comment and footnote 3.

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This instruction addresses the penalty-increasing factors set forth in subs. (2m) and (3) of § 940.32. Both subsections were created by 2001 Wisconsin Act 109, effective date: July 30, 2001. Application of the penalty factors depends on a finding of guilt for a violation of sub. (2), the offense addressed by Wis JI-Criminal 1284.

A violation of § 940.32(2) is a Class I felony. The facts listed in sub. (2m) increase the penalty to a Class H felony. The facts listed in sub. (3) increase the penalty to a Class F felony. These penalty classifications take effect February 1, 2003.

Penalty-increasing provisions in subsections (2m)(a), (2m)(b), and (3)(b) require proof of a prior conviction. In State v. Warbelton, 2009 WI 6, ¶3, 315 Wis.2d 253, 759 N.W.2d 557, the court held that the penalty-increasing provision in sub. (2m)(a) "is an element of the stalking crime, rather than a penalty enhancer." The Committee concluded that presenting the penalty-increasing fact as a special question, as done in this instruction, is not inconsistent with its status as an element of the crime. Warbelton also held that if a defendant stipulates to the existence of the prior conviction, the prior conviction element is still to be presented to the jury in the absence of a jury trial waiver on that element. In the Warbelton case, the parties stipulated to the fact of prior conviction. The stipulation was accepted, but the state refused to consent to a jury trial waiver on the prior conviction element. The supreme court held the trial court did not err in submitting the element to the jury. The court held that State v. Alexander, 214 Wis.2d 628, 571 N.W.2d 662 (1997), which allows withdrawal of the "status element" in a case involving a charge of operating with a prohibited alcohol concentration, is limited to prosecutions for driving while under the influence of an intoxicant or with a prohibited alcohol concentration. For a discussion of stipulations that go to elements of the crime and jury trial waivers in that context, see Wis JI-Criminal 162A, Law Note: Stipulations.

The facts must be found by the jury because they increase the statutorily-authorized penalty range. The following form is suggested for the verdict:

We, the jury, find the defendant guilty of stalking under Wis. Stat. § 940.32, at the time and place charged in the information.

We, the jury, find the defendant not guilty.

If you find the defendant guilty, answer the following question "yes" or "no":

[State the applicable question.]

1. The penalty-increasing facts set forth in sub. (2m) and (3) of § 940.32 apply to violations of § 940.32(2).

2. The applicable crimes are: a violent crime as defined in § 939.632(1)(e)1.; stalking under § 940.32; or, harassment under § 947.013(1r), (1t), (1v), or (1x).

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3. In State v. Conner, 2009 WI App 143, 321 Wis.2d 449, 775 N.W.2d 105, the court addressed the defendant's challenges to a conviction for stalking under § 940.32(2m)(b) — a Class H felony for the second violation within 7 years. As to the 7-year time period, the court concluded:

> . . . the seven year time restriction specified in § 940.32(2m)(b) requires that only the final act charged as part of a course of conduct occur within seven years of the previous conviction, and does not restrict by time the other acts used to establish the underlying course of conduct element of sub. (2).

2009 WI App 143, ¶19.

The Wisconsin Supreme Court affirmed. State v. Conner, 2011 WI 8, ¶47, ___ Wis.2d ___, ___ N.W.2d ___, holding that the statute "was properly applied in this case because, in this case, the 'present violation' was a continuing course of conduct that included the acts on November 30, 2005, and that occurred within seven years after the 2003 convictions for crimes involving the same victim."

4. Sub. (1)(cg) of § 940.32 provides: "'Personally identifiable information' has the meaning given in s. 19.62(5)."

Sub. (1)(cr) of § 940.32 provides: "'Record' has the meaning given in s. 19.32(2)."

5. Section 968.31(1) provides a criminal penalty for violating the "wiretap" statute. Sections 968.34(1) does the same for unauthorized use of a "pen register." A definition of the alleged crime should be included in the penalty question. There are no uniform instructions for these violations.

6. "Member of a family" is defined in § 940.32(1)(cb).

7. "Member of a household" is defined in § 940.32(1)(cd).

8. This is the definition of "bodily harm" provided in § 939.22(4).

9. The applicable crimes are: a violent crime as defined in § 939.632(1)(e)1.; stalking under § 940.32; or, harassment under § 947.013(1r), (1t), (1v), or (1x).

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1284B STALKING — § 940.32(2e)

[USE FOR OFFENSES COMMITTED ON OR AFTER APRIL 27, 2004]

Statutory Definition of the Crime

Stalking, as defined in § 940.32(2e) of the Criminal Code of Wisconsin, is committed by one who has been convicted of (specify applicable sexual assault or domestic abuse offense),[1] directs an act of (specify applicable act listed in § 940.32(1)(a)1. to 10.)[2] at the victim of that offense, causes that person [to suffer serious emotional distress] [to fear bodily injury or death to (himself) (herself) (a member of (his) (her) (family) (household)] and where the actor knows or should know that the act will [cause the person to suffer serious emotional distress] [place the person in reasonable fear of bodily injury or death to (himself) (herself) (a member of (his) (her) (family) (household)].

State's Burden of Proof

Before you may find the defendant guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following five elements were present.

Elements of the Crime That the State Must Prove

1. The defendant was convicted of (specify applicable sexual assault or domestic abuse offense).[3]
2. (Name of person) was the victim of that offense.

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3. The defendant directed an act of (specify applicable act listed in § 940.32(1)(a)1. to 10.)[4] at (name of person).

4. The act [caused (name of person) to suffer serious emotional distress] [induced fear in (name of person) of bodily injury or death to (himself) (herself) (a member of (his) (her) (family) (household)].

["Suffer serious emotional distress" means to feel terrified, intimidated, threatened, harassed, or tormented. This does not require that (name of person) received treatment from a mental heath professional.][5]

["Member of a family" means a spouse, parent, child, sibling, or any other person who is related by blood or adoption to another.][6]

["Member of a household" means a person (who regularly resides in the household of another) (who within the previous 6 months regularly resided in the household of another).][7]

5. The defendant knew or should have known that the act would [cause (name of person) to suffer serious emotional distress] [place (name of person) in reasonable fear of bodily injury or death to (himself) (herself) (a member of (his) (her) (family) (household)].[8]

Deciding About Intent and Knowledge

You cannot look into a person's mind to find intent and knowledge. Intent and knowledge must be found, if found at all, from the defendant's acts, words, and statements,

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if any, and from all the facts and circumstances in this case bearing upon intent and knowledge.

Jury's Decision

If you are satisfied beyond a reasonable doubt that all five elements of this offense have been proved, you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.

COMMENT

Wis JI-Criminal 1284B was originally published in 2003 and revised in 2004. This revision was approved by the Committee in October 2006 and revised footnote 1 to reflect changes made by 2005 Wisconsin Act 277.

2003 Wisconsin Act 222 amended § 940.32(2e) to add causing a person to "suffer serious emotional distress" and changing the mental state requirement addressed in the fifth element from "intends" to "knows or should know." The effective date of the statute is April 27, 2004.

Section 940.32(2e) was created by 2001 Wisconsin Act 109, effective date: July 30, 2002. Section 940.32, as revised by Act 109, defines two related offenses: violations of sub. (2e) are addressed by this instruction. Violations of sub. (2) are addressed by Wis JI-Criminal 1284. Subsections (2m) and (3) provide for increase in the penalty for violations of sub. (2) if specified facts are established. See Wis JI-Criminal 1284A.

1. Sub. (2e)(a) identifies the applicable prior offenses: sexual assault under § 940.225, sexual assault of a child under § 948.02, repeated sexual assault of a child under § 948.025, sexual assault of a child placed in substitute care under § 948.085, or a domestic abuse offense. § 940.32(1)(ap) provides: "'Domestic abuse offense' means an act of domestic abuse that constitutes a crime." § 940.32(1)(am) provides: "'Domestic abuse' has the meaning given in s. 813.12(1)(am)." That definition was amended by 2001 Wisconsin Act 109 to add reference to crimes committed "by an adult caregiver against an adult who is under the caregiver's care" and "by an adult against an adult with whom the individual has or had a dating relationship." 2005 Wisconsin Act 277 [effective date: April 20, 2006] amended the list of offenses in § 940.32(2e)(a) to include § 948.085, an offense created by Act 277.

2. Here specify the type of conduct alleged to be involved in the case and supported by the evidence, based on the list provided in subd. 1. through 10. of § 940.32(1)(a). The list of types of conduct is preceded by the statement: ". . . including any of the following: . . ." The Committee concluded that this means that acts constituting the course of conduct are limited to the types listed.

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2003 Wisconsin Act 222 added to the list in subds. 1. through 10 by creating subd. 6m.:

6m. Photographing, videotaping, audiotaping, or through any other electronic means, monitoring or recording the activities of the victim. This subdivision applies regardless of where the act occurs.

3. See note 1, supra. If the case involves a "domestic abuse offense" the state must prove that the defendant was convicted of a crime that involved "domestic abuse" as defined in § 813.12(1)(am). The conviction itself will be a matter of record, but that conviction must be shown to have involved "domestic abuse," which is not likely to be established by the mere fact of the conviction.

4. See note 2, supra.

5. The definition of "suffer serious emotional distress" is provided in § 940.32(1)(d), which was created by 2003 Wisconsin Act 222. The statement that receiving treatment is not required is based on § 940.32(3m), was also created by Act 22, which reads as follows:

(3m) A prosecutor need not need [sic] show that a victim received or will receive treatment from a mental health professional in order to prove that the victim suffered serious emotional distress under sub. (2)(c) or (2e)(c).

6. This is the definition provided in § 940.32(1)(cb).

7. This is the definition provided in § 940.32(1)(cd).

8. 2003 Wisconsin Act 222 amended § 940.32(2e)(b) to require that the actor "knows or should know that the act will cause the specific person to suffer serious emotional distress or place the specific person in reasonable fear . . ." Before that amendment, the statute had required that "the actor intends . . ."

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1285 ABDUCTION — § 940.32(1)

1286 ABDUCTION — § 940.32(2)

1287 ABDUCTION — § 940.32(3)

[INSTRUCTIONS WITHDRAWN]

COMMENT

Wis JI-Criminal 1285 was originally published in 1974 and was revised in 1985.

Wis JI-Criminal 1286 and 1287 were originally published in 1985.

The instructions were withdrawn in 1989 because the statute with which they deal was renumbered and revised by 1987 Wisconsin Act 332, effective July 1, 1989. Roughly equivalent offenses are defined in § 948.30, Abduction Of Another's Child. See Wis JI-Criminal 2160 through 2163.

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1290 INTIMIDATION OF A WITNESS: MISDEMEANOR — § 940.42

INSTRUCTION WITHDRAWN

SEE WIS JI-CRIMINAL 1292

COMMENT

Wis JI-Criminal 1290 was originally published in 1982 and revised in 1987 and 1994. It was withdrawn in 2000 when Wis JI-Criminal 1292 was revised to apply to both misdemeanor and felony violations of §§ 940.42 and 940.43.

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1292 INTIMIDATION OF A WITNESS — §§ 940.42 and 940.43

Statutory Definition of the Crime

Intimidation of a witness, as defined in § 940.42 of the Criminal Code of Wisconsin, is committed by one who knowingly and maliciously prevents or dissuades (or who attempts to so prevent or dissuade)[1] any witness from attending or giving testimony at any trial, proceeding, or inquiry authorized by law.

State's Burden of Proof

Before you may find the defendant guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following three elements were present.

Elements of the Crime That the State Must Prove

1. (Name of victim) was a witness.

   "Witness" means any person who has been called to testify or who is expected to be called to testify.[2]

2. The defendant (prevented) (dissuaded)[3] (attempted to prevent) (attempted to dissuade) (name of victim) from attending or giving testimony at a proceeding authorized by law.

   (A (name of proceeding) is a proceeding authorized by law.)[4]

3. The defendant acted knowingly and maliciously.[5]

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This requires that the defendant knew (name of victim) was a witness and that the defendant acted with the purpose to prevent (name of victim) from (attending) (testifying).

Deciding About Knowledge and Purpose

You cannot look into a person's mind to find knowledge and purpose. Knowledge and purpose must be found, if found at all, from the defendant's acts, words, and statements, if any, and from all the facts and circumstances in this case bearing upon knowledge and purpose.[6]

Jury's Decision

If you are satisfied beyond a reasonable doubt that all three elements of this offense have been proved, you should find the defendant guilty [and answer the following question "yes" or "no"].[7]

If you are not so satisfied, you must find the defendant not guilty.

ADD ONE OF THE FOLLOWING QUESTIONS IF A FELONY OFFENSE IS CHARGED AND THE EVIDENCE WOULD SUPPORT A FINDING THAT A PENALTY FACTOR SET FORTH IN § 940.43 IS ESTABLISHED:[8]

If you find the defendant guilty, you must answer the following question:

[FOR CHARGES UNDER SUB. (1)]

["Was the defendant's act accompanied by (attempted) force or violence upon [(name of witness)] [(identify relative) [9] of (name of witness)]?"]

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[FOR CHARGES UNDER SUB. (2)]

["Was the defendant's act accompanied by damage to the property of [(name of witness)] [(identify relative) [10] of (name of witness)]?"]

[FOR CHARGES UNDER SUB. (3)]

["Was the defendant's act accompanied by any express or implied threat of (name harm described in sub. (1) or (2) of § 940.43) ?"][11]

[FOR CHARGES UNDER SUB. (4)]

["Was the defendant's act in furtherance of any conspiracy?"][12]

[FOR CHARGES UNDER SUB. (5)]

["Does the defendant have a prior conviction for (a violation under §§ 940.42 to 940.45) (an act which, if committed in this state, would be a violation under §§ 940.42 to 940.45)?"]

[FOR CHARGES UNDER SUB. (6)]

["Did the defendant commit the act for monetary gain or for any other consideration acting on the request of any other person?"]

[FOR CHARGES UNDER SUB. (7)][13]

[Did the defendant commit the act in connection with a trial, proceeding, or inquiry in a felony case in which he was charged?]

[CONTINUE WITH THE FOLLOWING IN ALL FELONY CASES:]

If you are satisfied beyond a reasonable doubt that (repeat the question) , you should answer the question "yes."

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If you are not so satisfied, you must answer the question "no."

COMMENT

Wis JI-Criminal 1292 was originally published in 1982 and revised in 1987, 1994, 1998, 2001, and 2006. The 2001 revision changed the instruction to apply to both misdemeanor and felony offenses; it also replaced Wis JI-Criminal 1290 and 1292A. The 2006 revision added reference to sub. (7) of § 940.43, which was created by 2005 Wisconsin Act 280. See footnote 13. The 2010 revision made nonsubstantive editorial corrections.

This instruction is drafted for use in both misdemeanor and felony charges under §§ 940.42 and 940.43. The definition of the three basic elements is based on § 940.42 and is to be used in both felony and misdemeanor prosecutions; for felony offenses, a question is to be added so that the jury makes a finding whether the fact presented in the question is proved. Each of the facts specified in subs. (1)-(7) increases the penalty to that for a Class G felony.

Sections 940.41 through 940.49, relating to intimidation of victims and witnesses, were created by Chapter 118, Laws of 1981. They were based on a model statute proposed in 1979 by the Committee on Victims, American Bar Association Section of Criminal Justice.

Several other statutes define criminal offenses directed against a witness:

§ 940.201 Battery of Threat to Witness (See Wis JI-Criminal 1238 and 1239)
§ 943.011 Damage or Threat to Property of a Witness (See Wis JI-Criminal 1400B)
§ 946.61 Bribery of Witnesses

In State v. Moore, 2006 WI App 61, 292 Wis.2d 101, 713 N.W.2d 131, the court affirmed convictions for 14 counts of intimidating a witness. The evidence was sufficient to prove Moore attempted to intimidate the second witness/victim by letters written to the first witness/victim. Charging 14 counts based on 7 letters attempting to dissuade two witnesses did not violate the rules against multiplicity — there is no evidence of legislative intent to limit the number of charges.

1. Section 940.42 prohibits attempts to "prevent or dissuade" as well as the completed act. The material relating to attempts is drafted in parentheses throughout the instruction and should be included when the facts of the case support the attempt basis of liability.

Section 940.46, also created by Chapter 118, Laws of 1981, further provides that attempts to violate §§ 940.42 to 940.45 may be prosecuted as a completed act. This section is redundant in light of the fact that the definition of each substantive offense already prohibits both the completed act and an attempt.

If an attempt case is charged, it may be advisable to define "attempt" for the jury. The following is suggested:

> Attempt requires that the defendant intended to (prevent) (dissuade) (name of victim) from attending or giving testimony and did acts which indicated unequivocally that the defendant had that intent and would have (prevented) (dissuaded) (name of victim) from attending or giving

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testimony except for the intervention of another person or some other extraneous factor.

This definition is briefer than the full explanation of "attempt" found in Wis JI-Criminal 580 but is believed sufficient for most cases. See that instruction for a complete discussion of attempt.

2. The definition of "witness" in the instruction is a simplified version of the definition provided in § 940.41(3):

> (3) "Witness" means any natural person who has been or is expected to be summoned to testify; who by reason of having relevant information is subject to call or likely to be called as a witness, whether or not any action or proceeding has as yet been commenced; whose declaration under oath is received as evidence for any purpose; who has provided information concerning any crime to any peace officer or prosecutor; who has provided information concerning a crime to any employee or agent of a law enforcement agency using a crime reporting telephone hotline or other telephone number provided by the law enforcement agency; or who has been served with a subpoena issued under s. 885.01 or under the authority of any court of this state or of the United States.

Subsection 940.41(1g) provides that "law enforcement agency" has the meaning specified in § 165.83(1)(b).

Reading the statutory definition of "witness" in the context of the required elements of the crime led the Committee to conclude that the simplified version would be suitable for most cases. The facts of a particular situation may require more complete incorporation of the provisions of § 940.41(3).

3. "Dissuade" means "to advise against" or "to turn from by persuasion," Webster's New Collegiate Dictionary.

4. The Committee concluded that using the phrase "proceeding authorized by law" would cover the longer phrase used in the statute: "trial, proceeding or inquiry authorized by law." The broader term, "proceeding," would clearly include "trial" and "inquiry."

Most "proceedings authorized by law" will be authorized by a specific section of the statutes. When there is specific statutory authority, the Committee believes this may be communicated to the jury by stating, for example: "A John Doe hearing is a proceeding authorized by law."

5. Section 940.42 does not use any of the regular criminal code "intent" words, such as "intentionally" but rather contains the phrase "knowingly and maliciously." The terms "malice" and "maliciously" are not used anywhere else in the Wisconsin Criminal Code. "Maliciously" is defined in § 940.41(1r) as follows:

> (1r) "Malice" or "maliciously" means an intent to vex, annoy or injure in any way another person or to thwart or interfere in any manner with the orderly administration of justice.

This instruction reduces the mental purpose to that of preventing the witness from testifying because that purpose fits in best with the basic definition of the offense: attempting to prevent the witness from testifying. This kind of purpose is one that shows intent to interfere with the administration of justice.

6. This is the shorter version used to describe the process of finding knowledge and intent. The Committee concluded that it is suitable for use in most cases. For the longer description of the intent-finding

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process, see Wis JI-Criminal 923A.

7. Continue with the bracketed material if the felony offense is charged and add the appropriate question. For misdemeanor offenses, stop with "guilty" and read the next sentence, beginning with "If you are not so satisfied . . ."

8. Section 940.43 specifies seven different facts that increase the penalty for the basic misdemeanor offense to that for a Class G felony. A bracketed question is provided for each statutory option.

9. The penalty increase provided by § 940.43(1) applies to the following specified relatives of the witness: ". . . the spouse, child, stepchild, foster child, parent, sibling or grandchild of the witness or any person sharing a common domicile with the witness." Reference to "treatment foster child" was deleted by 2009 Wisconsin Act 28.

10. The same relatives are covered as under sub. (1) of the statute. See note 9, supra.

11. This is an abbreviated paraphrasing of the full subsection (3) of § 940.43, which provides: "Where the act is accompanied by any express or implied threat of force, violence, injury or damage described in sub. (1) or sub. (2)." The references to sub. (1) and (2) serve to broaden the coverage of the subsection to all threats to do personal injury or cause property damage to any witness or any relative of the witness. The appropriate description of the harm and the target of the threat should be inserted in the blank.

Subsection 940.43(3) refers to "any express or implied threat of force. . . ." (Emphasis supplied.) The suggested instruction does not include "express or implied" because the Committee concluded it was unnecessary. There must in fact be a threat, regardless of whether that threat is communicated by an express statement or implied from conduct. If a case clearly involves a threat implied from conduct, it may be appropriate to advise the jury that the statute covers those threats. Care should be taken, however, to assure that it remains clear that the threat, however communicated, must be established by proof which satisfies the jury beyond a reasonable doubt.

12. See Wis JI-Criminal 570 for a definition of the inchoate crime of conspiracy.

13. This option was added to reflect the alternative created by 2005 Wisconsin Act 280. [Effective date: April 20, 2006.] The question is a paraphrase of the statute, which reads as follows: "(7) Where the act is committed by a person who is charged with a felony in connection with a trial, proceeding, or inquiry for that felony."

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1292A INTIMIDATION OF A WITNESS: FELONY: FORCE THREATENED AGAINST A RELATIVE OF THE WITNESS — § 940.43(3)

INSTRUCTION WITHDRAWN

SEE WIS JI-CRIMINAL 1292

COMMENT

Wis JI-Criminal 1292A was originally published in 1982 and revised in 1987 and 1994. It was withdrawn in 2000 when Wis JI-Criminal 1292 was revised to apply to both misdemeanor and felony violations of §§ 940.42 and 940.43.

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1294 INTIMIDATION OF A VICTIM: MISDEMEANOR — § 940.44

INSTRUCTION WITHDRAWN

SEE WIS JI-CRIMINAL 1296

COMMENT

Wis JI-Criminal 1294 was originally published in 1987 and revised in 1991 and 1994. It was withdrawn in 2000 when Wis JI-Criminal 1296 was revised to apply to both misdemeanor and felony violations of §§ 940.44 and 940.45.

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1296 INTIMIDATION OF A VICTIM — §§ 940.44 and 940.45

Statutory Definition of the Crime

Intimidation of a victim, as defined in § 940.44 of the Criminal Code of Wisconsin, is committed by one who knowingly and maliciously prevents or dissuades (or who attempts to so prevent or dissuade)[1] another person who has been the victim of any crime from making any report of the victimization to any peace officer or law enforcement agency.[2]

State's Burden of Proof

Before you may find the defendant guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following three elements were present.

Elements of the Crime That the State Must Prove

1. (Name of victim) was a victim of a crime.

   "Victim" means a person against whom a crime has been committed or attempted in this state.[3]

   In this case, it is alleged that (name of victim) was a victim of (name of crime). (Name of crime), as defined in § ___ of the Criminal Code of Wisconsin, is committed by one who (refer to the uniform criminal jury instruction for a definition of the crime).[4] Before you may find the defendant guilty of intimidation of a victim, you must be satisfied beyond a reasonable doubt that (name of victim) was the victim of (name of crime).

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2. The defendant (prevented) (dissuaded)[5] (attempted to prevent) (attempted to dissuade) (name of victim) from reporting the crime to any law enforcement agency.[6]

3. The defendant acted knowingly and maliciously.[7]

This requires that the defendant knew (name of victim) was a victim of a crime and that the defendant (acted with the intent to injure or annoy another) (or) (acted with an intent to interfere with the orderly administration of justice).

Deciding About Knowledge and Intent

You cannot look into a person's mind to find knowledge and intent. Knowledge and intent must be found, if found at all, from the defendant's acts, words, and statements, if any, and from all the facts and circumstances in this case bearing upon knowledge and intent.[8]

Jury's Decision

If you are satisfied beyond a reasonable doubt that all three elements of this offense have been proved, you should find the defendant guilty [and answer the following question "yes" or "no"].[9]

If you are not so satisfied, you must find the defendant not guilty.

ADD ONE OF THE FOLLOWING QUESTIONS IF A FELONY OFFENSE IS CHARGED AND THE EVIDENCE WOULD SUPPORT A FINDING THAT A PENALTY FACTOR SET FORTH IN § 940.45 IS ESTABLISHED:[10]

If you find the defendant guilty, you must answer the following question:

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[FOR CHARGES UNDER SUB. (1)]

["Was the defendant's act accompanied by (attempted) force or violence upon [(name of victim)] [(identify relative) [11] of (name of victim)]?"]

[FOR CHARGES UNDER SUB. (2)]

["Was the defendant's act accompanied by damage to the property of [(name of victim)] [(identify relative) [12] of (name of victim)]?"]

[FOR CHARGES UNDER SUB. (3)]

["Was the defendant's act accompanied by any express or implied threat of (name harm described in sub. (1) or (2) of § 940.45) ?"][13]

[FOR CHARGES UNDER SUB. (4)]

["Was the defendant's act in furtherance of any conspiracy?"][14]

[FOR CHARGES UNDER SUB. (5)]

["Does the defendant have a prior conviction for (a violation under §§ 940.42 to 940.45) (an act which, if committed in this state, would be a violation under §§ 940.42 to 940.45)?"]

[FOR CHARGES UNDER SUB. (6)]

["Did the defendant commit the act for monetary gain or for any other consideration acting on the request of any other person?"]

[CONTINUE WITH THE FOLLOWING IN ALL FELONY CASES:]

If you are satisfied beyond a reasonable doubt that (repeat the question) , you should answer the question "yes."

If you are not so satisfied, you must answer the question "no."

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COMMENT

Wis JI-Criminal 1296 was originally published in 1987 and revised in 1991, 1994, 1998, and 2001. The 2001 revision involved adoption of a new format, nonsubstantive changes to the text, and updating of the comment. The revised instruction applies to both misdemeanor and felony offenses; it also replaces Wis JI-Criminal 1294. The 2010 revision made nonsubstantive editorial corrections.

This instruction is drafted for use in both misdemeanor and felony charges under §§ 940.44 and 940.45. A separate instruction is drafted for cases involving intimidation of a person acting on behalf of a victim. See Wis JI-Criminal 1296A.

The definition of the three basic elements is based on § 940.44 and is to be used in both felony and misdemeanor prosecutions; for felony offenses, a question is to be added so that the jury makes a finding whether the fact presented in the question is proved. Each of the facts specified in subs. (1)-(6) increases the penalty to that for a Class G felony.

Sections 940.41 through 940.49, relating to intimidation of victims and witnesses, were created by Chapter 118, Laws of 1981. They were based on a model statute proposed in 1979 by the Committee on Victims, American Bar Association Section of Criminal Justice.

1. Section 940.44 prohibits attempts to "prevent or dissuade" as well as the completed act. The material relating to attempts is drafted in parentheses throughout the instruction and should be included when the facts of the case support the attempt basis of liability.

Section 940.46, also created by Chapter 118, Laws of 1981, further provides that attempts to violate §§ 940.42 to 940.45 may be prosecuted as a completed act. This section is redundant in light of the fact that the definition of each substantive offense already prohibits both the completed act and an attempt.

If an attempt case is charged, it may be advisable to define "attempt" for the jury. The following is suggested:

> Attempt requires that the defendant intended to (prevent) (dissuade) (name of victim) from making a report of the victimization to any peace officer or law enforcement agency and did acts which indicated unequivocally that the defendant had that intent and would have (prevented) (dissuaded) (name of victim) from making a report except for the intervention of another person or some other extraneous factor.

This definition is briefer than the full explanation of "attempt" found in Wis JI-Criminal 580 but is believed sufficient for most cases. See that instruction for a complete discussion of attempt.

2. The concluding phrase of this paragraph, ". . . from making any report of the victimization to any peace officer or law enforcement agency," is a simplified paraphrasing of subsec. (1) of 940.44. There are two other subsections that are not addressed by the instruction. The three subsections read as follows:

> (1) Making any report of the victimization to any peace officer or state, local or federal law enforcement or prosecuting agency, or to any judge.
> (2) Causing a complaint, indictment or information to be sought and prosecuted and assisting in the prosecution thereof. [See Wis JI-Criminal 1297.]

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(3) Arresting or causing or seeking the arrest of any person in connection with the victimization.

3. The definition of "victim" in the instruction is a simplified version of the definition provided in § 940.41(2):

(2) "Victim" means any natural person against whom any crime as defined in s. 939.12 or under the laws of the United States is being or has been perpetrated or attempted in this state.

4. The statement in the first paragraph of the uniform instruction should usually be sufficient. It will virtually always be sufficient where the crime is also charged in the instant case. In other situations, it may be good practice to include a more complete definition of the crime, depending on the crime and the nature of the evidence.

In State v. Thomas, 161 Wis.2d 616, 468 N.W.2d 729 (Ct. App. 1991), the court found that it was error to fail to instruct sufficiently on the crime committed against the victim:

> The jury instruction should have specified and defined the crime or crimes underlying the alleged victimization. Additionally, the jury should have been told that it could not find the defendant guilty of intimidation of a victim unless the state proved the elements of the underlying crime or crimes beyond a reasonable doubt. The reason is clear: a jury that is not told which crime is the predicate for the intimidation-of-a-victim charge and is not instructed on the elements of that crime may very well conclude that certain conduct constitutes a crime when it does not.

161 Wis.2d 616, 624.

In many cases, it is likely that the defendant will also be charged with committing the underlying crime against the victim as well as with trying to intimidate that victim. In those situations, Wis JI-Criminal 1294 would be given after the jury had been instructed on the essential facts of the underlying crime and detailed recapitulation of those facts ought not to be necessary in Wis JI-Criminal 1294. If the jury has not been instructed on the underlying crime, a more detailed explanation may be required in order to satisfy the requirements of the Thomas case.

Acquittal on the underlying crime does not prevent conviction on the charge of intimidating the victim of that crime. State v. Thomas, supra.

5. "Dissuade" means "to advise against" or "to turn from by persuasion," Webster's New Collegiate Dictionary.

6. This statement substitutes "reporting the crime" for the statute's "report of the victimization" on the grounds that it means the same thing and will be more understandable. The second element reflects one alternative of several that are possible under the statute. See note 2, supra.

7. Section 940.44 does not use any of the regular criminal code "intent" words, such as "intentionally" but rather contains the phrase "knowingly and maliciously." The terms "malice" and "maliciously" are not used anywhere else in the Wisconsin Criminal Code. "Maliciously" is defined in § 940.41(1r) as follows:

(1r) "Malice" or "maliciously" means an intent to vex, annoy or injure in any way another person or to thwart or interfere in any manner with the orderly administration of justice.

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This instruction reduces the mental purpose to that of preventing the witness from testifying because that purpose fits in best with the basic definition of the offense: attempting to prevent the witness from testifying. This kind of purpose is one that shows intent to interfere with the administration of justice.

8. This is the shorter version used to describe the process of finding knowledge and intent. The Committee concluded that it is suitable for use in most cases. For the longer description of the intent-finding process, see Wis JI-Criminal 923A [formerly JI 923.1].

9. Continue with the bracketed material if the felony offense is charged and add the appropriate question. For misdemeanor offenses, stop with "guilty" and read the next sentence, beginning with "If you are not so satisfied . . ."

10. Section 940.45 specifies six different facts that increase the penalty for the basic misdemeanor offense to that for a Class G felony. A bracketed question is provided for each statutory option.

11. The penalty increase provided by § 940.45(1) applies to the following specified relatives of the witness: ". . . the spouse, child, stepchild, foster child, parent, sibling or grandchild of the witness or any person sharing a common domicile with the witness." Reference to "treatment foster child" was deleted by 2009 Wisconsin Act 28.

12. The same relatives are covered as under sub. (1) of the statute. See note 11, supra.

13. This is an abbreviated paraphrasing of the full subsection (3) of § 940.43, which provides: "Where the act is accompanied by any express or implied threat of force, violence, injury or damage described in sub. (1) or sub. (2)." The references to sub. (1) and (2) serve to broaden the coverage of the subsection to all threats to do personal injury or cause property damage to any witness or any relative of the witness. The appropriate description of the harm and the target of the threat should be inserted in the blank.

Subsection 940.43(3) refers to "any express or implied threat of force. . . ." (Emphasis supplied.) The suggested instruction does not include "express or implied" because the Committee concluded it was unnecessary. There must in fact be a threat, regardless of whether that threat is communicated by an express statement or implied from conduct. If a case clearly involves a threat implied from conduct, it may be appropriate to advise the jury that the statute covers those threats. Care should be taken, however, to assure that it remains clear that the threat, however communicated, must be established by proof which satisfies the jury beyond a reasonable doubt.

14. See Wis JI-Criminal 570 for a definition of the inchoate crime of conspiracy.

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1296A INTIMIDATION OF A PERSON ACTING ON BEHALF OF A VICTIM — §§ 940.44 and 940.45

Statutory Definition of the Crime

Intimidation of a person acting on behalf of a victim, as defined in § 940.44 of the Criminal Code of Wisconsin, is committed by one who knowingly and maliciously prevents or dissuades (or who attempts to so prevent or dissuade)[1] a person who is acting on the behalf of the victim of any crime from making any report of the victimization to any peace officer or law enforcement agency.[2]

State's Burden of Proof

Before you may find the defendant guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following four elements were present.

Elements of the Crime That the State Must Prove

1. (Name of victim) [3] was a victim of a crime.

   "Victim" means a person against whom a crime has been committed or attempted in this state.[4]

   In this case, it is alleged that (name of crime victim) was a victim of (name of crime). (Name of crime), as defined in § ___ of the Criminal Code of Wisconsin, is committed by one who (refer to the uniform criminal jury instruction for a definition of the crime).[5] Before you may find the defendant guilty of intimidation

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of a person acting on behalf of a victim, you must be satisfied beyond a reasonable doubt that (name of crime victim) was the victim of (name of crime).

2. (Name of person acting on behalf of crime victim)[6] was acting on behalf of (name of crime victim).

3. The defendant (prevented) (dissuaded)[7] (attempted to prevent) (attempted to dissuade) (name of person acting on behalf of crime victim) from reporting the crime to any law enforcement agency.[8]

4. The defendant acted knowingly and maliciously.[9]

This requires that the defendant knew (name of crime victim) was a victim of a crime and knew that (name of person acting on behalf of crime victim) was acting on behalf of (name of crime victim). This also requires that the defendant (acted with the intent to injure or annoy another) (or) (acted with an intent to interfere with the orderly administration of justice).

Deciding About Knowledge and Intent

You cannot look into a person's mind to find knowledge and intent. Knowledge and intent must be found, if found at all, from the defendant's acts, words, and statements, if any, and from all the facts and circumstances in this case bearing upon knowledge and intent.[10]

Jury's Decision

If you are satisfied beyond a reasonable doubt that all four elements of this offense have been proved, you should find the defendant guilty [and answer the following question "yes" or "no"].[11]

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If you are not so satisfied, you must find the defendant not guilty.

ADD ONE OF THE FOLLOWING QUESTIONS IF A FELONY OFFENSE IS CHARGED AND THE EVIDENCE WOULD SUPPORT A FINDING THAT A PENALTY FACTOR SET FORTH IN § 940.45 IS ESTABLISHED:[12]

If you find the defendant guilty, you must answer the following question:

[FOR CHARGES UNDER SUB. (1)]

["Was the defendant's act accompanied by (attempted) force or violence upon [(name of victim)] [(identify relative) [13] of (name of victim)]?"][14]

[FOR CHARGES UNDER SUB. (2)]

["Was the defendant's act accompanied by damage to the property of [(name of victim)] [(identify relative) [15] of (name of victim)]?"][16]

[FOR CHARGES UNDER SUB. (3)]

["Was the defendant's act accompanied by any express or implied threat of (name harm described in sub. (1) or (2) of § 940.45) ?"][17]

[FOR CHARGES UNDER SUB. (4)]

["Was the defendant's act in furtherance of any conspiracy?"][18]

[FOR CHARGES UNDER SUB. (5)]

["Does the defendant have a prior conviction for (a violation under §§ 940.42 to 940.45) (an act which, if committed in this state, would be a violation under §§ 940.42 to 940.45)?"]

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[FOR CHARGES UNDER SUB. (6)]

["Did the defendant commit the act for monetary gain or for any other consideration acting on the request of any other person?"]

[CONTINUE WITH THE FOLLOWING IN ALL FELONY CASES]

If you are satisfied beyond a reasonable doubt that (repeat the question), you should answer the question "yes."

If you are not so satisfied, you must answer the question "no."

COMMENT

Wis JI-Criminal 1296A was originally published in 2001. This revision made nonsubstantive editorial corrections.

This instruction adapts Wis JI-Criminal 1296 for charges alleging intimidation of a person acting on behalf of a crime victim. It is drafted for use in both misdemeanor and felony charges under §§ 940.44 and 940.45. The definition of the four basic elements is to be used in both situations; for felony offenses, a question is to be added so that the jury makes a finding as to whether the fact embodied in the question is proved. Each of the facts increases the penalty to that for a Class G felony.

See the Comment to Wis JI-Criminal 1296 for general information about §§ 940.41-940.49.

1. Section 940.44 prohibits attempts to "prevent or dissuade" as well as the completed act. The material relating to attempts is drafted in parentheses throughout the instruction and should be included when the facts of the case support the attempt basis of liability.

Section 940.46, also created by Chapter 118, Laws of 1981, further provides that attempts to violate §§ 940.42 to 940.45 may be prosecuted as a completed act. This section is redundant in light of the fact that the definition of each substantive offense already prohibits both the completed act and an attempt.

If an attempt case is charged, it may be advisable to define "attempt" for the jury. The following is suggested:

> Attempt requires that the defendant intended to (prevent) (dissuade) (name of victim) from making a report of the victimization to any peace officer or law enforcement agency and did acts which indicated unequivocally that the defendant had that intent and would have (prevented) (dissuaded) (name of victim) from making a report except for the intervention of another person or some other extraneous factor.

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This definition is briefer than the full explanation of "attempt" found in Wis JI-Criminal 580 but is believed sufficient for most cases. See that instruction for a complete discussion of attempt.

2. The concluding phrase of this paragraph, ". . . from making any report of the victimization to any peace officer or law enforcement agency," is a simplified paraphrasing of subsec. (1) of 940.44. There are two other subsections that are not addressed by the instruction. The three subsections read as follows:

> (1) Making any report of the victimization to any peace officer or state, local or federal law enforcement or prosecuting agency, or to any judge.
> (2) Causing a complaint, indictment or information to be sought and prosecuted and assisting in the prosecution thereof. [See Wis JI-Criminal 1297.]
> (3) Arresting or causing or seeking the arrest of any person in connection with the victimization.

3. Where the instruction calls for the "name of crime victim" use the name of the person who is alleged to be the victim of the underlying crime. The victim of the offense defined in this instruction is indicated by blanks labeled "name of person acting on behalf of the crime victim." See note 4, below.

4. The definition of "victim" in the instruction is a simplified version of the definition provided in § 940.41(2):

> (2) "Victim" means any natural person against whom any crime as defined in s. 939.12 or under the laws of the United States is being or has been perpetrated or attempted in this state.

5. The statement in the first paragraph of the uniform instruction should usually be sufficient. It will virtually always be sufficient where the crime is also charged in the instant case. In other situations, it may be good practice to include a more complete definition of the crime, depending on the crime and the nature of the evidence.

In State v. Thomas, 161 Wis.2d 616, 468 N.W.2d 729 (Ct. App. 1991), the court found that it was error to fail to instruct sufficiently on the crime committed against the victim:

> The jury instruction should have specified and defined the crime or crimes underlying the alleged victimization. Additionally, the jury should have been told that it could not find the defendant guilty of intimidation of a victim unless the state proved the elements of the underlying crime or crimes beyond a reasonable doubt. The reason is clear: a jury that is not told which crime is the predicate for the intimidation-of-a-victim charge and is not instructed on the elements of that crime may very well conclude that certain conduct constitutes a crime when it does not.

161 Wis.2d 616, 624.

In many cases, it is likely that the defendant will also be charged with committing the underlying crime against the victim as well as with trying to intimidate that victim. In those situations, Wis JI-Criminal 1296A would be given after the jury had been instructed on the essential facts of the underlying crime and detailed recapitulation of those facts ought not to be necessary in Wis JI-Criminal 1296A. If the jury has not been instructed on the underlying crime, a more detailed explanation may be required in order to satisfy the requirements of the Thomas case.

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Acquittal on the underlying crime does not prevent conviction on the charge of intimidating the victim of that crime. State v. Thomas, supra.

6. Where the instruction calls for the "name of person acting on behalf of crime victim" use the name of the person who is alleged to be the victim of the crime defined by this instruction. The victim of the underlying crime is referred to in the instruction as the "crime victim." See note 3, supra.

7. "Dissuade" means "to advise against" or "to turn from by persuasion," Webster's New Collegiate Dictionary.

8. This statement substitutes "reporting the crime" for the statute's "report of the victimization" on the grounds that it means the same thing and will be more understandable. The second element reflects one alternative of several that are possible under the statute. See note 2, supra.

9. Section 940.44 does not use any of the regular criminal code "intent" words, such as "intentionally" but rather contains the phrase "knowingly and maliciously." The terms "malice" and "maliciously" are not used anywhere else in the Wisconsin Criminal Code. "Maliciously" is defined in § 940.41(1r) as follows:

> (1r) "Malice" or "maliciously" means an intent to vex, annoy or injure in any way another person or to thwart or interfere in any manner with the orderly administration of justice.

This instruction reduces the mental purpose to that of preventing the witness from testifying because that purpose fits in best with the basic definition of the offense: attempting to prevent the witness from testifying. This kind of purpose is one that shows intent to interfere with the administration of justice.

10. This is the shorter version used to describe the process of finding knowledge and intent. The Committee concluded that it is suitable for use in most cases. For the longer description of the intent-finding process, see Wis JI-Criminal 923A [formerly JI 923.1].

11. Continue with the bracketed material if the felony offense is charged and add the appropriate question. For misdemeanor offenses, stop with "guilty" and read the next sentence, beginning with "If you are not so satisfied . . ."

12. Section 940.45 specifies six different facts that increase the penalty for the basic misdemeanor offense to that for a Class G felony. A bracketed question is provided for each statutory option.

13. The penalty increase provided by § 940.45(1) applies the following specified relatives of the witness: ". . . the spouse, child, stepchild, foster child, parent, sibling or grandchild of the witness or any person sharing a common domicile with the witness." Reference to "treatment foster child" was deleted by 2009 Wisconsin Act 28.

14. The Committee concluded that the aggravating factors described in subs. (1), (2), and (3) apply only to acts against the victim of the underlying crime and not to acts against the person acting on behalf of the crime victim.

15. The same relatives are covered as under sub. (1) of the statute. See note 13, supra.

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16. The Committee concluded that the aggravating factors described in subs. (1), (2), and (3) apply only to acts against the victim of the underlying crime and not to acts against the person acting on behalf of the crime victim.

17. This is an abbreviated paraphrasing of the full subsection (3) of § 940.43, which provides: "Where the act is accompanied by any express or implied threat of force, violence, injury or damage described in sub. (1) or sub. (2)." The references to sub. (1) and (2) serve to broaden the coverage of the subsection to all threats to do personal injury or cause property damage to any witness or any relative of the witness. The appropriate description of the harm and the target of the threat should be inserted in the blank.

Subsection 940.43(3) refers to "any express or implied threat of force. . . ." (Emphasis supplied.) The suggested instruction does not include "express or implied" because the Committee concluded it was unnecessary. There must in fact be a threat, regardless of whether that threat is communicated by an express statement or implied from conduct. If a case clearly involves a threat implied from conduct, it may be appropriate to advise the jury that the statute covers those threats. Care should be taken, however, to assure that it remains clear that the threat, however communicated, must be established by proof which satisfies the jury beyond a reasonable doubt.

The Committee concluded that the aggravating factors described in subs. (1), (2) and (3) apply only to acts against the victim of the underlying crime and not to acts against the person acting on behalf of the crime victim.

18. See Wis JI-Criminal 570 for a definition of the inchoate crime of conspiracy.

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1297 INTIMIDATION OF A VICTIM — §§ 940.44(2) and 940.45

Statutory Definition of the Crime

Intimidation of a victim, as defined in § 940.44(2) of the Criminal Code of Wisconsin, is committed by one who knowingly and maliciously prevents or dissuades (or who attempts to so prevent or dissuade)[1] another person who has been the victim of any crime from causing a complaint, indictment, or information to be sought and prosecuted and assisting in the prosecution thereof.

State's Burden of Proof

Before you may find the defendant guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following three elements were present.

Elements of the Crime That the State Must Prove

1. (Name of victim) was a victim of a crime.

   "Victim" means a person against whom a crime has been committed or attempted in this state.[2]

   In this case, it is alleged that (name of victim) was a victim of (name of crime). (Name of crime), as defined in § ___ of the Criminal Code of Wisconsin, is committed by one who (refer to the uniform criminal jury instruction for a definition of the crime).[3] Before you may find the defendant guilty of intimidation

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of a victim, you must be satisfied beyond a reasonable doubt that (name of victim) was the victim of (name of crime).

2. The defendant (prevented) (dissuaded)[4] (attempted to prevent) (attempted to dissuade) (name of victim) from [causing a (complaint) (indictment) (information) to be sought] (or) [causing a (complaint) (indictment) (information) to be prosecuted] (or) [assisting in the prosecution of a (complaint) (indictment) (information)].[5]

3. The defendant acted knowingly and maliciously.[6]

This requires that the defendant knew (name of victim) was a victim of a crime and that the defendant (acted with the intent to injure or annoy another) (or) (acted with an intent to interfere with the orderly administration of justice).

Deciding About Knowledge and Intent

You cannot look into a person's mind to find knowledge and intent. They must be found, if found at all, from the defendant's acts, words, and statements, if any, and from all the facts and circumstances in this case bearing upon knowledge and intent.[7]

Jury's Decision

If you are satisfied beyond a reasonable doubt that all three elements of this offense have been proved, you should find the defendant guilty [and answer the following question "yes" or "no"].[8]

If you are not so satisfied, you must find the defendant not guilty.

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ADD ONE OF THE FOLLOWING QUESTIONS IF A FELONY OFFENSE IS CHARGED AND THE EVIDENCE WOULD SUPPORT A FINDING THAT A PENALTY FACTOR SET FORTH IN § 940.45 IS ESTABLISHED:[9]

If you find the defendant guilty, you must answer the following question:

[FOR CHARGES UNDER SUB. (1)]

["Was the defendant's act accompanied by (attempted) force or violence upon [(name of victim)] [(identify relative) [10] of (name of victim)]?"]

[FOR CHARGES UNDER SUB. (2)]

["Was the defendant's act accompanied by damage to the property of [(name of victim)] [(identify relative) [11] of (name of victim)]?"]

[FOR CHARGES UNDER SUB. (3)]

["Was the defendant's act accompanied by any express or implied threat of (name harm described in sub. (1) or (2) of § 940.45) ?"][12]

[FOR CHARGES UNDER SUB. (4)]

["Was the defendant's act in furtherance of any conspiracy?"][13]

[FOR CHARGES UNDER SUB. (5)]

["Does the defendant have a prior conviction for (a violation under §§ 940.42 to 940.45) (an act which, if committed in this state, would be a violation under §§ 940.42 to 940.45)?"]

[FOR CHARGES UNDER SUB. (6)]

["Did the defendant commit the act for monetary gain or for any other consideration acting on the request of any other person?"]

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[CONTINUE WITH THE FOLLOWING IN ALL FELONY CASES:]

If you are satisfied beyond a reasonable doubt that (repeat the question), you should answer the question "yes."

If you are not so satisfied, you must answer the question "no."

COMMENT

Wis JI-Criminal 1297 was originally published in 2010. This revision was approved by the Committee in June 2015; it updated the Comment.

This instruction is drafted for use for both misdemeanor and felony charges under §§ 940.44(2) and 940.45. For violations of § 940.44(1) see Wis JI-Criminal 1296. A separate instruction is drafted for cases involving intimidation of a person acting on behalf of a victim. See Wis JI-Criminal 1296A.

Section 940.44(2) was amended by 2013 Wisconsin Act 14 [effective date: April 10, 2015] to codify the interpretation of the statute in State v. Freer, 2010 WI App 9, 323 Wis.2d 29, 779 N.W.2d 12. The text of the instruction already reflected the Freer interpretation so it was not affected by Act 14. See footnote 5, below.

The definition of the three basic elements is based on § 940.44(2) and is to be used in both felony and misdemeanor prosecutions; for felony offenses, a question is to be added so that the jury makes a finding whether the fact presented in the question is proved. Each of the facts specified in subs. (1)-(6) increases the penalty to that for a Class G felony.

Sections 940.41 through 940.49, relating to intimidation of victims and witnesses, were created by Chapter 118, Laws of 1981. They were based on a model statute proposed in 1979 by the Committee on Victims, American Bar Association Section of Criminal Justice.

1. Section 940.44 prohibits attempts to "prevent or dissuade" as well as the completed act. The material relating to attempts is drafted in parentheses throughout the instruction and should be included when the facts of the case support the attempt basis of liability.

Section 940.46, also created by Chapter 118, Laws of 1981, further provides that attempts to violate §§ 940.42 to 940.45 may be prosecuted as a completed act. This section is redundant in light of the fact that the definition of each substantive offense already prohibits both the completed act and an attempt.

If an attempt case is charged, it may be advisable to define "attempt" for the jury. The following is suggested:

> Attempt requires that the defendant intended to (prevent) (dissuade) (name of victim) from making a report of the victimization to any peace officer or law enforcement agency and did acts which indicated unequivocally that the defendant had that intent and would have (prevented)

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(dissuaded) (name of victim) from making a report except for the intervention of another person or some other extraneous factor.

This definition is briefer than the full explanation of "attempt" found in Wis JI-Criminal 580 but is believed sufficient for most cases. See that instruction for a complete discussion of attempt.

2. The definition of "victim" in the instruction is a simplified version of the definition provided in § 940.41(2):

(2) "Victim" means any natural person against whom any crime as defined in s. 939.12 or under the laws of the United States is being or has been perpetrated or attempted in this state.

3. The statement in the first paragraph of the uniform instruction should usually be sufficient. It will virtually always be sufficient where the crime is also charged in the instant case. In other situations, it may be good practice to include a more complete definition of the crime, depending on the crime and the nature of the evidence.

In State v. Thomas, 161 Wis.2d 616, 468 N.W.2d 729 (Ct. App. 1991), the court found that it was error to fail to instruct sufficiently on the crime committed against the victim:

> The jury instruction should have specified and defined the crime or crimes underlying the alleged victimization. Additionally, the jury should have been told that it could not find the defendant guilty of intimidation of a victim unless the state proved the elements of the underlying crime or crimes beyond a reasonable doubt. The reason is clear: a jury that is not told which crime is the predicate for the intimidation-of-a-victim charge and is not instructed on the elements of that crime may very well conclude that certain conduct constitutes a crime when it does not.

161 Wis.2d 616, 624.

In many cases, it is likely that the defendant will also be charged with committing the underlying crime against the victim as well as with trying to intimidate that victim. In those situations, Wis JI-Criminal 1294 would be given after the jury had been instructed on the essential facts of the underlying crime and detailed recapitulation of those facts ought not to be necessary in Wis JI-Criminal 1294. If the jury has not been instructed on the underlying crime, a more detailed explanation may be required in order to satisfy the requirements of the Thomas case.

Acquittal on the underlying crime does not prevent conviction on the charge of intimidating the victim of that crime. State v. Thomas, supra.

4. "Dissuade" means "to advise against" or "to turn from by persuasion," Webster's New Collegiate Dictionary.

5. Subsection (2) of § 940.44 reads as follows: "Causing a complaint, indictment or information to be sought and prosecuted and assisting in the prosecution thereof." The instruction provides for three alternatives as set forth in State v. Freer, 2010 WI App 9, 323 Wis.2d 29, 779 N.W.2d 12, which concluded that the statute was ambiguous because "'and' in the statutes is not always interpreted as a conjunctive term." The court relied on an LRB analysis of the bill to interpret the statute as though it read "or" instead of "and":

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> In light of the LRB analysis, we conclude that the legislature intended the victim intimidation statute to prohibit any act of intimidation that seeks to prevent or dissuade a crime victim from assisting in the prosecution. Accordingly, we read "and" in the phrase"causing a complaint . . . to be sought and prosecuted and assisting in the prosecution thereof" in the disjunctive, and thereby conclude that Wis. Stat. § 940.44(2) prohibits knowingly or maliciously preventing or dissuading a crime victim from providing any one or more of the following forms of assistance to prosecutors: (1) causing a complaint, indictment or information to be sought; (2) causing a complaint to be prosecuted; or (3) assisting in the prosecution.
> 2010 WI App 9, ¶24.

Section 940.44(2) was amended by 2013 Wisconsin Act 14 [effective date: April 10, 2015] to codify the interpretation of the statute in Freer. The text of the instruction already reflected the Freer interpretation so it was not affected by Act 14.

6. Section 940.44 does not use any of the regular criminal code "intent" words, such as "intentionally" but rather contains the phrase "knowingly and maliciously." The terms "malice" and "maliciously" are not used anywhere else in the Wisconsin Criminal Code. "Maliciously" is defined in § 940.41(1r) as follows:

> (1r) "Malice" or "maliciously" means an intent to vex, annoy or injure in any way another person or to thwart or interfere in any manner with the orderly administration of justice.

This instruction reduces the mental purpose to that of preventing the witness from testifying because that purpose fits in best with the basic definition of the offense: attempting to prevent the witness from testifying. This kind of purpose is one that shows intent to interfere with the administration of justice.

7. This is the shorter version used to describe the process of finding knowledge and intent. The Committee concluded that it is suitable for use in most cases. For the longer description of the intent-finding process, see Wis JI-Criminal 923A [formerly Wis JI-Criminal 923.1].

8. Continue with the bracketed material if the felony offense is charged and add the appropriate question. For misdemeanor offenses, stop with "guilty" and read the next sentence, beginning with "If you are not so satisfied . . ."

9. Section 940.45 specifies six different facts that increase the penalty for the basic misdemeanor offense to that for a Class D felony. A bracketed question is provided for each statutory option.

10. The penalty increase provided by § 940.45(1) applies to the following specified relatives of the witness: ". . . the spouse, child, stepchild, foster child, parent, sibling or grandchild of the witness or any person sharing a common domicile with the witness." Reference to "treatment foster child" was deleted by 2009 Wisconsin Act 28.

11. The same relatives are covered as under sub. (1) of the statute. See note 10, supra.

12. This is an abbreviated paraphrasing of the full subsection (3) of § 940.43, which provides: "Where the act is accompanied by any express or implied threat of force, violence, injury or damage described in sub. (1) or sub. (2)." The references to sub. (1) and (2) serve to broaden the coverage of the subsection to all threats to do personal injury or cause property damage to any witness or any relative of the witness. The appropriate description of the harm and the target of the threat should be inserted in the blank.

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Subsection 940.43(3) refers to "any express or implied threat of force. . . ." (Emphasis supplied.) The suggested instruction does not include "express or implied" because the Committee concluded it was unnecessary. There must in fact be a threat, regardless of whether that threat is communicated by an express statement or implied from conduct. If a case clearly involves a threat implied from conduct, it may be appropriate to advise the jury that the statute covers those threats. Care should be taken, however, to assure that it remains clear that the threat, however communicated, must be established by proof which satisfies the jury beyond a reasonable doubt.

13. See Wis JI-Criminal 570 for a definition of the inchoate crime of conspiracy.

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